

PREEMPTION BY FIAT: THE DEPARTMENT OF LABOR'S USURPATION OF POWER OVER NONCITIZEN WORKERS' RIGHTS TO UNEMPLOYMENT BENEFITS

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I. INTRODUCTION

This Article starts with the premise that the right to unemployment insurance benefits is a property right protected by the Fifth and Fourteenth Amendments to the United States Constitution, which apply to noncitizen unemployment applicants as well as to United States citizens. Given this assumption, certain actions being taken by the United States Department of Labor ("DOL") violate both procedural and substantive due process as well as the Administrative Procedure Act¹ ("APA"). The challenged actions involve the DOL's issuance of internally-created missives, termed Unemployment Insurance Program Letters ("Program Letters"), that purport to interpret the meaning of a requirement under federal unemployment law; the letters actually alter the meaning of that requirement. The requirement at issue is that, to be eligible for benefits, certain noncitizen unemployment applicants must qualify as "permanently residing in the United States under color of law" ("PRUCOL"). By changing the meaning of PRUCOL through Program Letters rather than the rulemaking process mandated by the APA, the DOL has both thwarted congressional design and reversed court decisions that have been developing for the past fifteen years.

Humanitarian and policy reasons dictate that we not inappropriately deny unemployment benefits to noncitizen workers, thereby encouraging their continued poor treatment in the workplace. In fact, affording these applicants benefits actually has the effect of deterring unfair labor practices.² Noncitizen workers "cannot come to [the

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¹ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

² See *Industrial Comm'n v. Arteaga*, 735 P.2d 473, 481 (Colo. 1987).

United States] simply to receive unemployment benefits; they have to work in order to be eligible."³ The distinction between government benefit and unemployment benefit recipients is reflected in the Immigration Reform and Control Act of 1986⁴ ("IRCA"), which prohibits noncitizens from utilizing federal benefit programs based on financial need for five years after receiving temporary resident status.⁵ Yet no such limitation exists with regard to unemployment benefits, demonstrating Congress' recognition that to authorize certain noncitizens to work while denying them the right to collect unemployment benefits is unjust.⁶

II. LEGISLATIVE HISTORY OF PRUCOL

About twenty years ago, a new phrase emerged in the legal landscape. That phrase, "permanently residing in the United States under color of law," or PRUCOL, first appeared in an amendment to a federal statute relating to public entitlement under Supplemental Security Income⁷ ("SSI"), and subsequently in amendments to the Aid to Families with Dependent Children⁸ ("AFDC"), medicaid,⁹ and unemployment¹⁰ statutes; later, the phrase came to be scrutinized in decisions of the state and federal courts.¹¹

The first use of the notion of PRUCOL is found in legislation enacted in 1972,¹² resulting from senators' concerns that, as proposed, SSI would only be available to United States citizens and legal per-

³ *Gillar v. Employment Div.*, 717 P.2d 131, 140 n.13 (Or. 1986).

⁴ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

⁵ 8 U.S.C. §§ 1160(f), 1255a(h)(1) (1988).

⁶ *Brambila v. Board of Review*, N.J. Dep't of Labor & Indus., 591 A.2d 605, 613 (N.J. 1991).

⁷ See Social Security Amendments of 1972, Pub. L. No. 92-603, § 1614(a)(1)(B)(i), 86 Stat. 1329, 1471 (codified at 42 U.S.C. § 1382c(a)(1)(B) (1988)) (adding PRUCOL language to statutes providing federal financial assistance to indigent individuals).

⁸ See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2320(a)(3), 92 Stat. 357, 857 (codified at 42 U.S.C. § 602(a)(33) (1988)) (adding PRUCOL language to statutes providing federal financial assistance to indigent families).

⁹ Omnibus Reconciliation Act of 1986, Pub. L. No. 99-509, § 9406(b), 100 Stat. 1874, 2058 (codified at 42 U.S.C. § 1396b(v)(1) (1988)) (adding PRUCOL language to federal medical financial assistance statutes).

¹⁰ Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95-19, § 302(a), 91 Stat. 39, 44 (codified at 26 U.S.C. § 3304(a)(14) (1988)) (adding PRUCOL language to federal unemployment compensation statutes).

¹¹ See *infra* part III.

¹² See 42 U.S.C. § 1382c(a)(1)(B) (1988).

manent residents.¹³ The proposed change relieved states of the sole burden of caring for aged, blind, and disabled aliens who, while not legal permanent residents, were residing in the state pursuant to actions of federal immigration authorities.¹⁴

Unfortunately, though, the statute did not define PRUCOL. Scrutiny of the legislative histories of the various statutes that employ this criterion makes clear that Congress intended the phrase to be interpreted broadly.¹⁵ In 1985, when Congress was drafting what would become IRCA, the House of Representatives proposed to define PRUCOL narrowly, including only a few classifications of aliens—refugees, asylees, persons granted withholding of deportation, those in the United States since 1972, those paroled into the United States, and persons granted deferred action status.¹⁶ But the proposal was unsuccessful, resulting in a final bill that did not reflect this limitation. And recently, when Congress added a PRUCOL requirement to noncitizen eligibility for federal financial assistance to states for non-emergency medicaid, the House report stressed that “[t]he Committee intends that the Secretary and the States broadly interpret the phrase ‘under color of law’ to include all of the categories recognized by immigration law, policy, and practice in effect at the time.”¹⁷

Congress’ decision (or non-decision) during the 1985-86 enactment of IRCA to again not define PRUCOL supports the inference that our congressional leaders were satisfied with the broad readings of PRUCOL that had emanated from the courts since the late 1970s. For, if not satisfied, they would have enacted more specific, defining provisions such as the one proposed by the House of Representatives in 1985. In fact, courts searching for their own definitions of PRUCOL have gotten this message precisely from Congress’ inaction,¹⁸ and have generally interpreted the phrase broadly.¹⁹ Similarly,

¹³ H.R. REP. NO. 231, 92d Cong., 1st Sess. 5322 (1971). For a more detailed review of the legislative history, see Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395, 411-12 (1987-88).

¹⁴ See 118 CONG. REC. 33,959 (1972); 42 U.S.C. § 1382c(a)(1)(B) (1988).

¹⁵ See Calvo, *supra* note 13, at 411. Courts have agreed with this statement: “[B]ased on our examination of the language of the [SSI eligibility] provision and our review of its legislative history, we find that the phrase ‘under color of law,’ is designed to be an open vessel—to be given substance by experience.” *Berger v. Heckler*, 771 F.2d 1556, 1574 (2d Cir. 1985). “[T]he ‘color of law’ provision is inherently elastic, and we reject the . . . restrictive interpretation.” *Id.* at 1575.

¹⁶ H.R. REP. NO. 3810, 99th Cong., 1st Sess. § 121(c) (1985).

¹⁷ H.R. REP. NO. 727, 99th Cong., 2d Sess. 111 (1986); see 42 U.S.C. § 1396b(v)(1) (1988).

¹⁸ See, e.g., *Industrial Comm’n v. Arteaga*, 735 P.2d 473, 478 n.8 (Colo. 1987).

¹⁹ See *Sandoval v. Colorado Div. of Employment*, 757 P.2d 1105, 1107 (Colo. Ct. App. 1988).

on other issues, congressional failure to amend a statutory provision, or consideration and rejection of proposed legislation designed to amend an established statutory scheme, has been aptly interpreted to indicate the lack of congressional desire to change the law or its interpretation.²⁰ In fact, Congress' failure *on several occasions* to make suggested changes has been seen as a "deliberate preservation" of the status quo.²¹ This rule of interpretation appears to accurately reflect the congressional state of mind regarding PRUCOL—Congress is satisfied with the courts' interpretation of the phrase, and does not need a more specific definition of PRUCOL in IRCA.

Even though Congress has implicitly approved the prevailing definition of PRUCOL, serious hardships have been visited on noncitizen workers residing in the United States who have become unemployed. If they are not permanent residents or similarly situated, they can receive unemployment benefits only if they satisfy the PRUCOL requirements. But these requirements have been subject to recent efforts by the DOL to greatly narrow the interpretation of PRUCOL by issuing Program Letters purporting to define PRUCOL. These efforts have been undertaken in spite of the fact that, for native and foreign workers alike, Congress acknowledged the crucial nature of unemployment compensation benefits in its decision to provide federal funding for state unemployment compensation programs;²² by the DOL, which administers the Federal Unemployment Tax Act²³ ("FUTA"), when it stated that "unemployment insurance is designed to prevent the destitution [occasioned by unemployment] by immediately providing a cash payment to meet the worker's nondeferrable expenses,"²⁴ and that "[u]nemployment compensation payments are designed to smooth the transition between periods of employment by mitigating to a degree the erosion of the household budget caused by temporary unemployment;"²⁵ by the states, whose initial sections of unemployment statutes affirm that the laws are designed to lighten the burden of unemployment "which . . . falls with crushing force

²⁰ See, e.g., *Independent Bankers Ass'n v. Federal Home Loan Bank Bd.*, 557 F. Supp. 23, 26 (D.D.C. 1982).

²¹ *Id.*

²² See *Wilkinson v. Abrams*, 627 F.2d 650, 666 (3d Cir. 1980).

²³ The Federal Unemployment Tax Act ("FUTA") provides for a cooperative federal-state program that administers unemployment benefits. 26 U.S.C. §§ 3301-11 (1988 & Supp. I 1989 & Supp. II 1990); see *infra* text accompanying notes 32-37.

²⁴ *Wilkinson*, 627 F.2d at 666.

²⁵ *Id.*

upon the unemployed worker and his [sic] family;"²⁶ and by the courts, which have found that the significance of these benefits to claimants whose "'source of steady income which supports family, health, and home has disappeared . . . cannot be overstated.'"²⁷

Although Congress gives financial assistance through FUTA for the states' administration of unemployment programs, Congress intended the states to be free to establish independent systems, and to have those systems judged on the basis of the literal language imposed on them by FUTA. This is clear from the 1935 Social Security Act's extensive history.²⁸ "The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely essential should be left to the States.'"²⁹ Hence, when Congress seeks to impose a condition on state compensation systems, it does so explicitly; the absence of an explicit condition has been "accepted as a strong indication that Congress did not intend to restrict the States' freedom to legislate in [that] area."³⁰ Accordingly, in the absence of "'compelling congressional direction,'"³¹ courts should not infer that Congress has denied the states the power to act. This principle is applicable to Congress' failure to define PRUCOL; the interpretation of this language must fairly be left to the states.

Despite the states' intended independence in the unemployment arena, all participate in a cooperative federal-state program established and governed by FUTA and administered by the DOL. In order for a state to participate in the program, however, the state system must satisfy minimum statutory standards.³² Once a state program is certified, local employers pay a payroll tax into a state

²⁶ COLO. REV. STAT. § 8-70-102 (1986); see ILL. ANN. STAT. ch. 48, para. 300 (Smith-Hurd 1986); MASS. ANN. LAWS ch. 151A, § 74 (Law. Co-op. 1989).

²⁷ *Cosby v. Ward*, 843 F.2d 967, 984 (7th Cir. 1988) (quoting *Camacho v. Bowling*, 562 F. Supp. 1012, 1024 (N.D. Ill. 1983)).

²⁸ See *New York Tel. Co. v. New York Dep't of Labor*, 440 U.S. 519, 536-38 (1979).

²⁹ *Id.* at 537 n.28 (quoting REPORT OF THE COMMITTEE ON ECONOMIC SECURITY, reprinted in *Hearings on S. 1130 before the Senate Committee on Finance*, 74th Cong., 1st Sess. 1311, 1326 (1935)); see *International Bhd. Elec. Workers v. Hawaiian Tel. Co.*, 713 P.2d 943, 954 (Haw. 1986).

³⁰ *New York Tel. Co.*, 440 U.S. at 538.

³¹ *Id.* at 540 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)).

³² But the legislative history of FUTA supports the notion that the states, which administer the programs, will promulgate rules and regulations to do so. See 122 CONG. REC. 22,911 (1976) (House debates).

unemployment fund³³ and are awarded tax credits of up to ninety percent against their basic FUTA tax liability.³⁴ Further, the states receive federal funds to reimburse their administrative costs.³⁵ FUTA does contain provisions for decertification and loss of federal funds, however, if the Secretary of Labor finds that a state has amended its law so that it no longer contains the provisions specified in § 3304(a), has failed to comply substantially with its standards, or has failed to amend a state statute to ensure that it contains the provisions required in § 3304(a).³⁶

One requirement for FUTA certification is that unemployment recipients satisfy the PRUCOL requirement.³⁷ Specifically, 26 U.S.C. § 3304(a) prohibits payment of unemployment compensation to noncitizens, except in situations in which they (1) were lawfully admitted into the United States for permanent residence at the time the work was performed, (2) were lawfully present in the United States for the purposes of performing the work, or (3) were PRUCOL at the time the work was performed. Like other federal and state statutes requiring PRUCOL, the term is not defined. In order to comply with FUTA's PRUCOL requirement, states have amended their unemployment statutes to include sections that essentially mirror its language.³⁸ Given that none of the statutes define PRUCOL, one would expect the state unemployment agencies and the courts visiting the issue to defer to the 1977 case of *Holley v. Lavine*,³⁹ decided by the Court of Appeals for the Second Circuit. That decision, which interpreted PRUCOL broadly, established an initial working definition of the phrase.⁴⁰ Since then, it has been followed by an

³³ See 26 U.S.C. § 3303(a) (1988) (basing payroll taxes on a percentage of wages paid to all employees, and on each employee's experience rating).

³⁴ 26 U.S.C. § 3302; see *Industrial Comm'n v. Arteaga*, 735 P.2d 473, 476 (Colo. 1987).

³⁵ *Rivera v. Patino*, 524 F. Supp. 136, 140 (N.D. Cal. 1981).

³⁶ See 26 U.S.C. § 3304(c) (1988); *Pickering v. Labor & Indus. Review Comm'n*, 456 N.W.2d 874, 876 (Wis. Ct. App. 1990).

³⁷ 26 U.S.C. § 3304(a)(14)(A) (1988) ("[C]ompensation shall not be payable on the basis of services performed by an alien unless such alien . . . was permanently residing in the United States under color of law at the time such services were performed.").

³⁸ See COLO. REV. STAT. § 8-73-107(7)(a) (1986); MASS. ANN. LAWS ch. 151A, § 25(h) (Law. Co-op. 1989); MINN. STAT. ANN. § 268.08(8) (West 1992); TEX. REV. CIV. STAT. ANN. art. 5221b-1(h) (West Supp. 1993).

³⁹ 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947 (1978).

⁴⁰ *Holley*, a noncitizen who had been living in the United States illegally but had six minor American-citizen children, challenged a denial of Aid to Families with Dependent Children ("AFDC") benefits. *Holley*, 553 F.2d at 847-48. The basis of the denial was a New York State regulation, which provided that an alien unlawfully residing in the United States was ineligible for AFDC. *Id.* at 847. The court found her to be in PRUCOL status because the Immigration

overwhelming number of jurisdictions that have carefully developed *Holley's* defining principles.⁴¹

III. COURT DEVELOPMENT OF THE MEANING OF PRUCOL

To understand the term "permanently residing in the United States under color of law" one must distinguish between "permanently residing" and "under color of law." In defining the phrase "permanently residing," the *Holley* court studied 8 U.S.C. § 1101(a)(31), the section of the Immigration and Nationality Act which provides that "[t]he term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary."⁴² The court wrote, "a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual."⁴³ It defined "under color of law" as embracing not only situations within the body of the law, but also others "enfolded by a colorable imitation. 'Under color of law' means that which an official does by virtue of power, as well as what he [sic] does by virtue of right. The phrase encircles the law, its shadows, and its penumbra,"⁴⁴ and includes cases that, while strictly outside that law, are near its border.⁴⁵

and Naturalization Service ("INS") knew of her illegal status and presence, but took no steps to deport her. *Id.* at 849-51.

⁴¹ The following are a sample of decisions in accord: *Alfred v. Florida Dep't of Labor & Employment Sec.*, 487 So. 2d 355, 358-59 (Fla. Dist. Ct. App. 1986) (finding unemployment claimants to be in PRUCOL status, as they were "permanently residing" until a final decision as to deportability was made following an immigration hearing, and as they were here "under color of law" when INS exercised its discretion not to use its enforcement powers to deport them); *Vazquez v. Review Bd. of Ind. Employment Sec. Div.*, 487 N.E.2d 171, 173-74 (Ind. Ct. App. 1985); *Cruz v. Commissioner of Pub. Welfare*, 478 N.E.2d 1262, 1265-67 (Mass. 1985); *Flores v. Department of Jobs & Training*, 411 N.W.2d 499, 502 (Minn. 1987); *Gillar v. Employment Div.*, 717 P.2d 131, 137-40 (Or. 1986) (finding unemployment claimant in PRUCOL status because his political asylum application to the immigration judge prevented the INS from seeking to deport him until the judge issued a decision on the asylum claim making claimant's presence in the United States both "under color of law" and "permanent"); *Rubio v. Employment Div.*, 674 P.2d 1201, 1202-03 (Or. Ct. App. 1984) (finding unemployment claimant who had applied for permanent resident status to be PRUCOL because the INS sent forms to him at his address, evidencing its knowledge that he was in the United States and, as it had regularly extended his voluntary departure, acquiesced to his presence here); *Lapre v. Department of Employment Sec.*, 513 A.2d 10, 11-13 (R.I. 1986).

⁴² *Holley*, 553 F.2d at 850 (quoting 8 U.S.C. § 1101(a)(31) (1988)).

⁴³ *Id.*

⁴⁴ *Id.* at 849.

⁴⁵ The court found *Holley* to be in the United States under color of law when the INS exercised its discretion not to enforce the letter of the law against her. *Id.* at 850.

Several years later, when the Second Circuit revisited the PRUCOL question in *Berger v. Heckler*,⁴⁶ it reaffirmed that the scope of the phrase "permanently residing under color of law" was "'both expansive and elastic,'"⁴⁷ "designed to be adaptable and to be interpreted over time in accordance with experience, developments in the law, and the like. In this sense the phrase is organic and fluid, rather than prescriptive or formulaic."⁴⁸ According to the *Berger* court, the term "permanently residing" "more closely resembled 'lasting' or 'enduring' than 'forever.'"⁴⁹ The court added that the phrase "under color of law" "'invites dynamic interpretation by both courts and the administrative agency charged with the statute's enforcement to determine the statute's application in particular cases in the light of developments in the country's immigration policy.'"⁵⁰

In addition to federal courts, most state courts addressing this issue have agreed with the *Holley* court's interpretation of PRUCOL.⁵¹

⁴⁶ 771 F.2d 1556 (2d Cir. 1985) (interpreting PRUCOL regarding AFDC regulations).

⁴⁷ *Id.* at 1571 (quoting the trial court judge).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1576.

⁵⁰ *Id.* at 1571 (quoting the trial court judge).

⁵¹ California and the Court of Appeals for the Ninth Circuit have taken the extreme minority position by denying PRUCOL status to a noncitizen AFDC recipient who had applied for asylum but had no work authorization. See *Sudomir v. McMahon*, 767 F.2d 1456 (9th Cir. 1985), followed in *Zurmati v. McMahon*, 225 Cal. Rptr. 374 (Ct. App. 1986). In both cases, the courts required "any affirmative admission or grant of status by a competent official authority" of a specific status that carries with it the right of the alien to reside in the United States for an indefinite period of time. *Zurmati*, 225 Cal. Rptr. at 381. In other words, there must be an "official sanctioning" of the noncitizen's presence and an "official determination" that the noncitizen can remain indefinitely. *Sudomir*, 767 F.2d at 1460. In *Sudomir*, the court stated that "[t]he status of asylum applicants and its duration can hardly be described as fixed, or permanent. [It is] best described as inchoate." *Id.* at 1461. While the court admitted that "permanent" did not mean "forever," it also did not embrace "transitory, inchoate, or temporary relationships." *Id.* at 1462. The court found reasonable the claim of the Secretary of Health and Human Services that Congress never intended to extend welfare benefits to aliens whose presence in the United States is unlawful and whose sole claim to entitlement rests on their filing applications for asylum. *Id.* at 1464. And, while the court found that the claimants were here under color of law, it found them here temporarily, as their continued presence was dependent solely upon the possibility of having their asylum applications acted upon favorably. *Id.* at 1462.

Sudomir does not provide authority for resolving the issue in situations in which a state already has its own interpretation of PRUCOL. In addition, *Sudomir* is distinguishable from the situations at issue in the unemployment area. The *Sudomir* court distinguished the legislative intent underlying unemployment law regarding PRUCOL from that underlying AFDC. *Id.* at 1464; see *Gillar v. Employment Div.*, 717 P.2d 131, 138-39 (Or. 1986) (making the same distinction between AFDC and unemployment cases). Finally, the *Sudomir* decision is, simply, wrong. See *Sudomir*, 767 F.2d, at 1467-68 (Canby, J., dissenting). Other courts have expressly said so. For example, in *Solis v. Department of Health & Rehabilitative Servs.*, 546 So. 2d 1073, 1074 n.5 (Fla. Dist. Ct. App. 1989), *aff'd*, 580 So. 2d 146 (Fla. 1991), the court stated that "[t]o

One example is the case of *Cruz v. Commissioner of Public Welfare*,⁵³ expressing Massachusetts' interpretation of PRUCOL, and expanding the interpretation of "under color of law" beyond that of *Holley*.

In *Cruz*, the plaintiff challenged a state Department of Public Welfare regulation that precluded certain noncitizens from receiving medicaid benefits.⁵³ The plaintiff entered the United States as a child on a visitor's visa in 1972 and resided here continuously thereafter. Her mother later married an American citizen who filed a petition for adjustment of status that, when approved, accorded plaintiff's mother permanent resident status.⁵⁴ Thereafter, plaintiff completed a petition to adjust her status based on her mother's status but, before action was taken, she became ill and fell into a state of semi-consciousness. As the prognosis for survival was poor, her family did not pursue the adjustment application. Five years later, however, the plaintiff was still alive and, reaching the age of twenty-two, was about to become ineligible for her mother's health coverage. In anticipation of that event, the nursing home caring for plaintiff filed a medicaid application on her behalf.⁵⁵ A requirement in Massachusetts' welfare regulations, however, provided that, as a noncitizen, plaintiff could not receive benefits unless she were "lawfully admitted as a non-immigrant by statutory acknowledgement of continuous residence."⁵⁶ Plaintiff argued that under federal regulations, which governed the federal-state medicaid programs, the state had to accord her benefits because she was in PRUCOL status.⁵⁷

The Massachusetts Supreme Judicial Court, seeking to establish an appropriate standard for PRUCOL, noted the absence of a Supreme Court opinion interpreting the phrase PRUCOL, but relied on *Holley*

the extent that *Sudomir* is contrary to our holding . . . we do not agree with nor follow it. Indeed, we have already rejected that decision, which was decided in 1985, by rendering our contrary holding in *Alfred [v. Florida Dep't of Labor & Employment Sec., 487 So. 2d 355 (Fla. Dist. Ct. App. 1986)]* in 1986." The distinction the *Sudomir* court made between "mere" temporary asylum applicants (*Sudomir* plaintiffs) and those "permanent" asylum applicants covered by extended voluntary departure is disingenuous given the fact that once an asylum application is filed, deportation proceedings are stayed. See 8 U.S.C. § 1253(h) (1988 & Supp. II, 1990); see also INS Operating Instruction 242.1(a)(23), 7 Immigration Law Serv. (Law. Co-op.) 298-99 (June 1991) (no deportation proceeding will be instituted while a petition for adjustment of status is pending).

⁵³ 478 N.E.2d 1262 (Mass. 1985).

⁵⁴ *Id.* at 1262. Like the unemployment insurance program, the medical assistance program is a cooperative effort between the federal and state governments. *Id.* at 1265.

⁵⁵ *Id.* at 1263.

⁵⁶ *Id.* at 1263-64.

⁵⁷ *Id.* at 1264 (quoting MASS. REGS. CODE tit. 106, § 503.200 (1990)).

⁵⁸ *Cruz*, 478 N.E.2d at 1264.

and other states' decisions that had already interpreted it.⁵⁸ As have many other courts addressing this issue, the court gave great deference to *Holley*, devoting nearly two pages of its four-and-a-half page opinion to the case. In the end, the court ruled that Cruz fell within the ambit of *Holley*'s PRUCOL holding, because the plaintiff had resided in the United States for over twelve years, her mother was a permanent resident, her step-father was an American citizen, many of her relatives resided here, the circumstances suggested that her presence here was not temporary, and the Immigration and Naturalization Service ("INS") had been aware of her continued residence and could have proceeded to deport her, but had not.⁵⁹ An inference was warranted that "the INS has acquiesced in the plaintiff's continued presence in this country," and that the INS was not likely to seek to deport her in the future.⁶⁰ In fact, in ruling that the INS's knowledge of Cruz's presence and failure to take steps to deport her amounted to acquiescence reaching the level of PRUCOL, the Supreme Judicial Court's definition of PRUCOL went beyond that in *Holley*.⁶¹

Unfortunately, and in spite of the decision in *Cruz*, the Massachusetts Department of Employment and Training has been influenced by Program Letters issued by the DOL, whose instructions have not been promulgated as regulations.⁶² These Letters have created problems, because although PRUCOL is a minimum eligibility re-

⁵⁸ *Id.* at 1265-66. The court cited several state court decisions following *Holley*, including *Papadopoulos v. Shang*, 414 N.Y.S.2d 152 (App. Div. 1979) (medicaid); *Rubio v. Employment Div.*, 674 P.2d 1201 (Or. Ct. App. 1984) (unemployment); *Antillon v. Department of Employment Sec.*, 688 P.2d 455 (Utah 1984) (unemployment).

⁵⁹ *Cruz*, 478 N.E.2d at 1266.

⁶⁰ *Id.*

⁶¹ The fact that *Holley* and *Cruz* concerned, respectively, AFDC and medicaid, and not unemployment eligibility questions, does not detract from their applicability to the unemployment situation. In fact, if the distinctions have any effect at all, they should facilitate findings of eligibility for noncitizens who have worked and paid into an account expecting that insurance would be available if the need arose. Noncitizens "cannot come to [the United States] simply to receive unemployment benefits; they have to work in order to be eligible." *Gillar v. Employment Div.*, 717 P.2d 131, 140 n.13 (Or. 1986). This distinction between government benefit recipients and unemployment benefit recipients is reflected in IRCA, which prohibits noncitizens from taking advantage of federal benefit programs based on financial need for five years following the receipt of temporary resident status. 8 U.S.C. §§ 1160(f), 1255a(h)(1) (1988); see *Brambila v. Board of Review*, N.J. Dep't of Labor & Indus., 591 A.2d 605, 613 (N.J. 1991). Yet, no such limitation exists with regard to unemployment benefits, which demonstrates that Congress recognizes that to authorize certain noncitizens to work while denying them the right to collect unemployment benefits would be unjust. *Brambila*, 591 A.2d at 613.

⁶² Given that unemployment benefits are a property interest and may not be abridged without the protection of due process as required by the Fourteenth Amendment, see *Berg v. Shearer*, 755 F.2d 1343, 1345 (8th Cir. 1985), a substantial alteration to the meaning of

quirement imposed by Congress, not the DOL, the reactions of various state unemployment agencies and courts indicate that many are unclear as to whether they are bound by the nearly unanimous, broad interpretation of PRUCOL developed by the courts, or by the DOL's narrow one, as reflected in these Program Letters.

Since 1985, the DOL has issued at least four Program Letters addressing the PRUCOL issue,⁶³ each one further carving away at a definition that had been developing through years of jurisprudence. Because they are not promulgated as regulations, there is no notice, public participation period, nor any public discussion. Nonetheless, the Letters are written to sound like directives, and many state courts and agencies have treated them as such.⁶⁴ For example, in Massachusetts, the Department of Employment and Training has incorporated the Program Letters' restrictive definitions of PRUCOL into its eligibility workers' manual.⁶⁵ Hence, what would once have been findings of eligibility in this area of statutory entitlement are now findings of ineligibility due solely to these Program Letters. In fact, one Massachusetts unemployment claimant has had to wait more than a year to receive benefits to which he was originally entitled, but was denied based on lack of PRUCOL status as defined by the Program Letters.⁶⁶ And this occurred in a state in which as recently as 1985 the Supreme Judicial Court adopted the *Holley* ra-

PRUCOL as is attempted by the DOL Program Letters must not be made without either statutory amendments or the promulgation of regulations. See *infra* part V.

⁶³ See *infra* notes 242-44 and accompanying text.

⁶⁴ See, e.g., *Industrial Comm'n v. Arteaga*, 735 P.2d 473, 477 n.7 (Colo. 1987) (discussing the effect of Unemployment Insurance Program Letter No. 1-86 (U.S. Dep't Labor, Employment & Training Admin. Oct. 28, 1985), 51 Fed. Reg. 29,713 (1986) the court stated that "the Department of Labor has directed all states to award unemployment compensation benefits").

Given that unemployment is one of the areas in which the statute has created an entitlement, these actions should not be taken lightly. *Brown v. Porcher*, 502 F. Supp. 946 (D.S.C. 1980), *aff'd in part*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983).

⁶⁵ The language of Unemployment Insurance Program Letter No. 1-86, Change 1 (U.S. Dep't Labor, Employment & Training Admin. Feb. 16, 1989) is present in the *Massachusetts Unemployment Insurance Service Representatives Handbook*, which reads that in order for a claimant to be considered PRUCOL the claimant must prove that the INS knew of the noncitizen's presence and provided the noncitizen with written assurance that enforcement of deportation was not planned. In spite of recent reversals of denials that were based on this language, it has not been modified. MASSACHUSETTS UNEMPLOYMENT INSURANCE SERVICE REPRESENTATIVES HANDBOOK § 1513 (March 1991). See *infra* note 66.

⁶⁶ Decision of Board of Review, Appeal No. BR-50412-OP (Mass. Dep't Employment & Training Dec. 10, 1992); see Brief of Amicus Curiae on Behalf of the Employment Rights Coalition, Application for Further Review, Board of Review No. 50412 (on file with author); Appeal Results, Docket No. 071767 (Mass. Dep't Employment & Training Mar. 19, 1992).

tionale to broadly interpret PRUCOL.⁶⁷ The confusion of the Massachusetts agency is only one example of the deleterious effects of these Program Letters.

Fortunately, not all jurisdictions confronted with the Program Letters have been intimidated into adopting the DOL's dictates on PRUCOL over their own. One example is a 1987 Minnesota decision, the case of *Flores v. Department of Jobs & Training*.⁶⁸ Flores was a Mexican citizen who had applied for permanent residence and had received written notice from the INS authorizing her employment and informing her that, because she was a protected class member, it would take no action to deport her until further notice. A few years later, though, when the injunction was dissolved, the INS informed her that she was subject to deportation after thirty days, and that her work authorization would then terminate.⁶⁹ Nine months and nine extensions later, all with employment authorization, she returned to Mexico and sought to reenter the United States, was denied a permanent resident visa, but was paroled into the United States on humanitarian grounds.⁷⁰ Upon returning, she regained her job as a hotel cook, was soon laid off, received unemployment benefits, and was then rehired, only to be laid off five months later.⁷¹ When her second claim for benefits was denied, the state demanded restitution of her prior benefits on the ground that she had been "unavailable for work," as required by Minnesota law, because she no longer had INS work authorization.⁷² Minnesota had recently adopted this rule regarding availability in response to Program Letter 1-86. On appeal, the Minnesota Supreme Court ruled that such a blanket rule requiring proof of INS work authorization was an unwarranted extension of the legislature's availability requirement.⁷³ Rather, the court found that the availability question should be answered with a view to

⁶⁷ See *Cruz v. Commissioner of Pub. Welfare*, 478 N.E.2d 1262 (Mass. 1985). In spite of the Massachusetts unemployment agency's policy to follow the Program Letters, one Review Examiner there recently issued a decision awarding unemployment benefits, even though the claimant was ineligible under Unemployment Insurance Program Letter No. 1-86, Change 1 (U.S. Dep't Labor, Employment & Training Admin. Feb. 16, 1989). See Massachusetts Dep't Employment & Training Decision, Docket Nos. 092888, 092887, 092886 (Aug. 1992). The Review Examiner found that, notwithstanding the DOL rule, the state agency was bound by state common law, citing both *Cruz* and *Holley*, and finding that under that law, the claimant met the requirements for a finding of PRUCOL. *Id.*

⁶⁸ 411 N.W.2d 499 (Minn. 1987).

⁶⁹ *Id.* at 500.

⁷⁰ *Id.* at 500-01.

⁷¹ *Id.* at 501.

⁷² *Id.* at 501-02.

⁷³ *Flores*, 411 N.W.2d at 502.

whether the claimant is genuinely attached to the labor market, and determined that this claimant was.⁷⁴ Flores had returned to the same job upon reentering the United States, remained there for five months until laid off, and thereafter actively sought work.⁷⁵

The key import of *Flores* for the PRUCOL question lies in the court's handling of Program Letter 1-86, issued some months after Flores' second claim for benefits was filed. The court acknowledged that the DOL had changed its position in Program Letter 1-86; the DOL had previously considered the eligibility of an alien authorized to work but whose authorization had expired before a claim was made to be resolved by state law.⁷⁶ However, in its more recent Program Letter, the DOL directed that "an alien must be legally authorized to work in the United States to be considered 'available for work.'"⁷⁷ The court stated that although Program Letter 1-86 purported to interpret § 3304(a)(14)(A), that section did not condition federal approval of a state unemployment compensation statute on the inclusion of "availability" as a requisite for eligibility.⁷⁸ So the court employed two methods to avoid applying Program Letter 1-86's requirement: first, it found the Program Letter inapplicable to the specific situation, as the claim had been reopened prior to its effective date;⁷⁹ second, it declined to add "availability" as a requirement under § 3304(a)(14)(A).⁸⁰ While acknowledging that an interpretive letter was entitled to deference, the court emphasized that this Letter was not controlling.⁸¹ Because of this statement, the decision left little likelihood that the DOL would decertify Minnesota from FUTA participation. And, as the purpose of the Minnesota availability requirement was to test the claimant's attachment to the labor market, the court indicated that it was "disinclined to accord the DOL's *altered* interpretation retroactive effect by engrafting onto [its] accepted definition of availability *additional* eligibility requirements."⁸²

⁷⁴ *Id.* at 502-03.

⁷⁵ *Id.* at 503.

⁷⁶ *Id.*; see Unemployment Insurance Program Letter No. 15-78 (U.S. Dep't Labor, Employment & Training Admin. Jan. 24, 1978).

⁷⁷ Unemployment Insurance Program Letter No. 1-86 (U.S. Dep't Labor, Employment & Training Admin. Oct. 28, 1985), 51 Fed. Reg. 29,713 (1986).

⁷⁸ *Flores*, 411 N.W.2d at 503.

⁷⁹ *Id.* Another court not content to follow the DOL's Program Letters has used a similar justification, again artfully avoiding being explicit as to why it chose not to apply the Letter. See *Industrial Comm'n v. Arteaga*, 735 P.2d 473, 477 n.7 (Colo. 1987).

⁸⁰ *Flores*, 411 N.W.2d at 504.

⁸¹ *Id.* at 503.

⁸² *Id.* at 504 (emphasis added). Since IRCA's enactment and its prohibition against employers hiring employees without work authorization, lack of work authorization while applying for

So, recognizing that these were "altered" and "additional" eligibility requirements, the court held that the new Minnesota rule reflecting the Program Letter was inconsistent with the statute.

The *Flores* decision informs the issues raised in this Article. As "availability" was not a requirement in FUTA at the time the facts of *Flores* arose, Minnesota could not make more stringent requirements than those incorporated in FUTA, even with the sanction of the DOL Program Letter. Similarly, while it is true that PRUCOL is a requirement of FUTA, because Congress has chosen not to specifically define PRUCOL, it is not for the DOL to do so; nor is it proper for the states to add insult to injury by following the DOL's lead. Just as the *Flores* court did not adopt the DOL's altered and additional requirements for availability, the states should not accept the DOL's "altered" and "additional" requirements for PRUCOL.

More recently, in 1990, another court questioned the impact of these Program Letters. In *Castillo v. Jackson*,⁸³ the question focused on whether noncitizen unemployment claimants who were eligible for amnesty under IRCA should be considered PRUCOL as of the effective date of the Act. If so, the claimants would have been eligible for benefits.⁸⁴ The court explained that, according to the Program Letters, IRCA would have no effect on whether the claimants were PRUCOL; rather, the Program Letters (and Illinois regulations promulgated accordingly) allowed PRUCOL status to be established only if the INS exercised affirmative discretion against deportation, and granted the foreign applicant permission in writing to reside indefinitely in the United States.⁸⁵ But the court declined to apply the rule of these Letters, reasoning that while deference is accorded an agency's regulation interpreting a statute, this deference does not replace judicial analysis.⁸⁶ Hence, as the DOL's interpretation of PRUCOL was at odds with congressional design, it was not sustained.⁸⁷

unemployment benefits does affect eligibility for unemployment. Still, *Flores*' point is well taken: because FUTA did not require availability as a requirement for unemployment benefits, Minnesota could not create more stringent requirements.

⁸³ 566 N.E.2d 404, 405 (Ill. App. Ct. 1990), *aff'd*, 594 N.E.2d 323 (Ill. 1992).

⁸⁴ *Id.*

⁸⁵ *Id.* at 408-09.

⁸⁶ *Id.* at 409.

⁸⁷ *Id.* (quoting H.R. REP. NO. 682, 99th Cong., 2d Sess. 49 (1986), *reprinted in* 1986 U.S.C.A.N. 5653). One should note that the court's use of excuses, if you will, for not applying these Program Letters did not necessarily weaken them, as the court did assume that they had the force and effect of regulations, "The DOL pronouncements . . . are not binding on this court, as . . . less deference is owed an agency's regulation which interprets only under general authority" *Id.* The relevance of this point will become clear in part IV, *infra*.

Another court also explicitly refused to defer to these Program Letters as substitutes for the judgment of the courts "on all questions of statutory interpretation."⁸⁸ In *Cosby v. Ward*,⁸⁹ Illinois unemployment applicants were in the unusual position of arguing that a DOL interpretation should apply, as the DOL's definition of what constituted a sufficient work search was more generous than the local Illinois rule.⁹⁰ Although the DOL's interpretation of the scope of an adequate work search was described in an unpublished letter, the plaintiffs wanted that interpretation to control.⁹¹ The court refused, finding that the federal act required claimants to make a "systematic and sustained" search for work.⁹² While the work search requirement was subject to interpretation, the Program Letter did not interpret it; rather, it merely elaborated on the statement, which was "phrased in equally general terms."⁹³ Thus, the court held that the plaintiffs could not rely on the authority of the DOL Letters in their challenge to Illinois' administration of the unemployment programs.⁹⁴ Here again, we find another court unwilling to bind the states to a federal agency's interpretation, providing additional validation of the view that states need not feel bound by the DOL's Program Letters.

In 1991, the Supreme Court of New Jersey, in *Brambila v. Board of Review, New Jersey Department of Labor & Industry*,⁹⁵ strengthened the argument that the Program Letters should bind neither the states nor their agencies. This case went even further than did the earlier decisions, as it addressed directly the question of threatened FUTA decertification. In *Brambila*, noncitizens who had applied to the INS for permanent resident status, a process that can take up to four years, appealed the denial of unemployment benefits.⁹⁶ New Jersey's Department of Labor and Industry followed a 1988 Program Letter that imposed an additional eligibility requirement not found in either FUTA or IRCA; in order for noncitizens in the process of legalization to be considered "legally present" in the United States (and hence eligible for unemployment benefits), they must have been granted temporary-resident status.⁹⁷ The New Jersey Supreme Court

⁸⁸ *Cosby v. Ward*, 843 F.2d 967, 981 (7th Cir. 1988).

⁸⁹ 843 F.2d 967 (7th Cir. 1988).

⁹⁰ *Id.* at 979-81.

⁹¹ *Id.* at 979-80.

⁹² *Id.* at 981.

⁹³ *Id.*

⁹⁴ *Cosby*, 843 F.2d at 981.

⁹⁵ 591 A.2d 605 (N.J. 1991).

⁹⁶ *Id.* at 606-07.

⁹⁷ *Id.* at 612.

held that the additional eligibility requirement in the Program Letter was not binding on the state in its administration of the unemployment program.⁹⁸ The court did not express any concern that the difference between its conclusion and the Program Letter would lead the DOL to "decertify" New Jersey's unemployment insurance program, as both had a requirement that the noncitizen be "lawfully present;"⁹⁹ simply, the DOL and New Jersey interpreted the meaning of the phrase differently. Moreover, New Jersey's interpretation was supported by the absence in both FUTA and IRCA of "lawfully present" being dependent on receipt of temporary-resident status, as the DOL had asserted.¹⁰⁰ The court went on to find the DOL's requirement to be inconsistent with congressional intent in enacting IRCA, which was to "allow qualified aliens to contribute openly to society and . . . to prevent the exploitation of this vulnerable population in the workplace."¹⁰¹

Consequently, there are several grounds on which state agencies and courts could elect not to enforce these Program Letters. First, they could consider the DOL pronouncements to be "altered" and "additional" requirements, as did the *Flores* court. The DOL can be said to have added the requirements of an affirmative exercise of discretion against deportation and written permission to stay in the United States indefinitely to the already well-developed, broad interpretation made by *Holley* and succeeding courts. Second, as did the court in *Castillo*, the states could defer to congressional intent and not to the DOL, which is merely an agency granted general power by Congress to enforce a congressional mandate. This argument is particularly strong, especially because the policy in question appears to be at odds with the legislative history of IRCA. Third, states could decide that their own interpretation of PRUCOL is, like the interpretation in *Brambila*, merely different from that of the DOL, again asserting that a broader interpretation more readily comports with congressional design. This is a weighty argument, particularly considering that, without specific direction from Congress, states may adopt their own rules to comply with a federal statute, rules that can

⁹⁸ *Id.*

⁹⁹ *Id.* at 613.

¹⁰⁰ *Id.*

¹⁰¹ *Brambila*, 591 A.2d at 613 (quoting H.R. REP. NO. 682, 99th Cong., 2d Sess. 49 (1986), reprinted in 1986 U.S.C.A.N. 5653). Other courts have echoed the view that humanitarian and policy reasons dictate that we not inappropriately deny unemployment benefits to noncitizen workers, thereby encouraging their poor treatment in the workplace; in fact, affording them benefits has the effect of deterring unfair labor practices for both citizens and noncitizens alike. *Industrial Comm'n v. Arteaga*, 735 P.2d 473, 481 (Colo. 1987).

be more generous than the minimum requirements established by federal law.¹⁰²

IV. THE APA WAS VIOLATED WHEN THE DEPARTMENT OF LABOR
USED PROGRAM LETTERS TO IMPOSE SUBSTANTIALLY ALTERED
AND ADDITIONAL PRUCOL REQUIREMENTS ON NONCITIZEN
UNEMPLOYMENT APPLICANTS

Given the legislative, and hence political, history of PRUCOL, and the fact that courts since the late 1970s have been refining its meaning with largely consistent results, it is unlawful for the DOL to promulgate new rules defining PRUCOL without following the procedures directed by the APA. Although the DOL's Program Letters purport to be mere interpretations or statements of opinion, they carry the implicit threat of state decertification upon noncompliance. In spite of congressional deference to the states' power to control this arena, the DOL nonetheless has continued to place undue pressure on the states to adhere to its policy pronouncements, and to provide unemployment compensation only to those noncitizens it believes should collect benefits.¹⁰³ The legislative history of the term PRUCOL, and the DOL's efforts to change it, lead one to conclude confidently that the DOL's refusal to follow rulemaking procedures is part of a conscious effort to change the definition of PRUCOL, while at the same time thwarting the public's right to have input into these changes.

The APA promulgates procedures to be followed by various federal administrative agencies that come within its authority.¹⁰⁴ A rule is defined in the APA as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy."¹⁰⁵ Prior to promulgating, amending, modifying, or repealing a rule, § 553 of the U.S. Code requires administrative agencies to afford the public certain rulemaking procedures, including notice of the proposed rule and an opportu-

¹⁰² See *Ibarra v. Texas Employment Comm'n*, 645 F. Supp. 1060, 1070 (E.D. Tex. 1986), *rev'd*, 823 F.2d 873 (5th Cir. 1987).

¹⁰³ *Id.* at 1068 (challenging the validity of a consent decree involving unemployment benefits for noncitizens in which the DOL, while careful to remain outside the litigation, continually tried to offer its view on which noncitizens should receive unemployment compensation).

¹⁰⁴ 5 U.S.C. §§ 500-90 (1988 & Supp. II 1990). The DOL is such an agency. 5 U.S.C. § 551(1) (1988).

¹⁰⁵ 5 U.S.C. § 551(4) (1988).

nity to comment on it.¹⁰⁶ The purposes of affording these opportunities are two-fold: first, to "reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies,"¹⁰⁷ and second, to provide full information, by "assur[ing] that the agency will have before it the facts and information relevant to a particular administrative problem."¹⁰⁸

[T]he 30-day notice rule serves an important interest, the right of the people to present their views to the government agencies which increasingly permeate their lives. The interchange of ideas between the government and its citizenry provides a broader base for intelligent decision-making and promotes greater responsiveness to the needs of the people, especially . . . where Congress has only roughed in its program.¹⁰⁹

Given these purposes, the rulemaking provisions are expected to be generously construed.¹¹⁰

Exceptions to the rulemaking procedures exist, and certain agency actions have long been expressly exempt from the notice and comment requirements of § 553. These include matters relating to "agency management or personnel, or to public property, loans, grants, benefits, or contracts."¹¹¹ Nonetheless, since 1971, the DOL and several other federal agencies expressed an explicit policy of not relying on this exemption as a reason for failing to comply with the notice and public participation requirements of § 553.¹¹² Despite this,

¹⁰⁶ 5 U.S.C. § 553 (1988). These procedures are commonly referred to as informal rulemaking, or notice and comment, as opposed to the formal rulemaking required in §§ 556 and 557, which require the agency to conduct a formal hearing.

¹⁰⁷ *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980), *quoted in* *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

¹⁰⁸ *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978).

The citizen dealing with a governmental agency is entitled to know. He is entitled to know what the standards are where the agency presumes to promulgate administrative regulations. He is entitled to know *in advance* of their promulgation so that he or his interest may be heard. Nor are these regulations to be changed willy-nilly without some notice of a proposal to do so.

Yellow Transit Freight Lines, Inc. v. United States, 221 F. Supp. 465, 470 (N.D. Tex. 1963) (emphasis added).

¹⁰⁹ *Kelly v. United States Dep't of Interior*, 339 F. Supp. 1095, 1102 (E.D. Cal. 1972).

¹¹⁰ *Dimaren v. Immigration and Naturalization Serv.*, 398 F. Supp. 556, 559 (S.D.N.Y. 1974).

¹¹¹ 5 U.S.C. § 553(a)(2) (1988). Such broad exemptions were criticized early on. See Arthur E. Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. Pa. L. Rev. 540, 554 (1969-1970).

¹¹² See 29 C.F.R. § 2.7 (1992).

several agencies that have issued regulations waiving the exemptions, including the DOL, have not always lived up to this policy.¹¹³ And, in *Cubanski v. Heckler*,¹¹⁴ where the Department of Health and Human Services ignored rulemaking requirements, the federal appeals court accepted the Department's claim that because rulemaking requirements had been voluntarily imposed in exempt situations, the Department was excused for not following them.¹¹⁵ Four justices on the Court of Appeals for the Ninth Circuit dissented from the court's denial of a rehearing, issuing a scathing opinion that the effects of the case would "wreak havoc with administrative decision-making."¹¹⁶ Unfortunately, after the Supreme Court granted certiorari, but before argument, the Omnibus Reconciliation Act of 1987 was enacted, and the Department's compliance with it rendered the controversy moot.¹¹⁷ Consequently, the Supreme Court did not have the opportunity to review the validity of this agency action.

In spite of the questionable validity of the opinion in *Cubanski*, another circuit court of appeals recently cited *Cubanski* when it upheld the DOL's failure to follow rulemaking procedures for certain substantive, legislative regulations.¹¹⁸ In *Cosby v. Ward*¹¹⁹ the court reasoned that because the DOL had voluntarily reimposed the notice and comment rules on itself, it did not have to follow § 553 in order to give its regulations the force and effect of law. This reasoning is circuitous and wrong, because the long-standing policy, codified in the Code of Federal Regulations, that the DOL will not rely on § 553(a)(2) exemptions as grounds for not complying with the notice and comment procedures,¹²⁰ should be able to be relied on as trustworthy.¹²¹

There are other exceptions to the notice and comment requirements, specified in the statute, that are relevant here. These include exceptions for "interpretive rules, general statements of policy, or

¹¹³ These problems will not be addressed in this Article, as 5 U.S.C. § 553(a)(2) has not been invoked regarding the issues of import here.

¹¹⁴ 781 F.2d 1421 (9th Cir. 1986), *vacated sub nom.* *Bowen v. Kizer*, 485 U.S. 386 (1988) (rendered moot and dismissed).

¹¹⁵ *Id.* at 1428-29.

¹¹⁶ 794 F.2d 540, 541 (9th Cir. 1986) (Kozinski, J., dissenting) (the reported opinion is the dissent from the denial to hear the case en banc).

¹¹⁷ See *Bowen v. Kizer*, 485 U.S. 386, 387 (1988).

¹¹⁸ *Cosby v. Ward*, 843 F.2d 967, 980 (7th Cir. 1988).

¹¹⁹ 843 F.2d 967 (7th Cir. 1988).

¹²⁰ See *supra* note 112 and accompanying text.

¹²¹ I spend no more time on this issue, as there is no reason to believe that the DOL is relying on this argument to justify its failure to follow rulemaking requirements in the PRUCOL arena.

rules of agency organization, procedure, or practice."¹²² Such exceptions are recognized "'only reluctantly,'"¹²³ so as not to defeat the "salutory purposes behind the provisions"¹²⁴ of § 553. Given Congress' purposes in enacting the APA, and the warnings recorded in legislative history that the various exceptions should not be used to evade the requirements of § 553,¹²⁵ its exceptions are intended only to preserve flexibility in the "limited situations where substantive rights are not at stake."¹²⁶ The exceptions commonly "accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition and reduction in expense."¹²⁷

The purpose of the first exception, exempting interpretive rules from the notice and comment requirements, "is to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings."¹²⁸ While it is often a difficult task to distinguish between legislative or substantive rules and interpretive rules, the latter "state what the administrative agency thinks [a] statute means, and only remind affected parties of existing duties."¹²⁹ Legislative rules, on the other hand, create new law or impose new rights or duties, and hence alter the existing regulatory scheme and the rights and obligations created by the statute.¹³⁰ They establish "'binding norm[s],"¹³¹ standards of conduct that have the force of law and that significantly impact those regulated.¹³²

¹²² 5 U.S.C. § 553(b)(3)(A) (1988). The good cause exception of § 553(b)(3)(B) is not at issue here.

¹²³ *National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982) (quoting *Humana, Inc. v. Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978), *cert. denied*, 459 U.S. 1205 (1983)).

¹²⁴ *Id.*

¹²⁵ *American Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980).

¹²⁶ *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

¹²⁷ *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978).

¹²⁸ *American Hosp. Ass'n*, 834 F.2d at 1045.

¹²⁹ *Federal Farm Credit Banks Funding Corp. v. Farm Credit Admin.*, 731 F. Supp. 217, 223 (E.D. Va. 1990).

¹³⁰ See *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 207 (4th Cir. 1989); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972); *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 744-45 (3d Cir. 1969); *Trinity Indus., Inc. v. Dole*, 760 F. Supp. 1194, 1198-99 (N.D. Tex. 1991), *vacated*, 963 F.2d 795 (5th Cir. 1992) (dismissing because plaintiffs had suffered no injury and did not have standing to sue).

¹³¹ *Pacific Gas & Elec. v. Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (quoting Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 *YALE L.J.* 581, 598 (1951)); see *Kessler v. FCC*, 326 F.2d 673, 690 (D.C. Cir. 1963).

¹³² *Lewis-Mota*, 469 F.2d at 482.

Given that the interpretive rule exception is narrowly construed and only reluctantly countenanced,¹³³ whether a change should be considered a substantive rule subject to rulemaking or merely an interpretive one is determined by two basic inquiries. First, are the regulated parties subject to "any new substantive duties or deprived of any preexisting substantive rights?"¹³⁴ Here, courts compare the regulation's constraints before and after the change. Second, is there "genuine ground for difference of opinion on the wisdom of the policy embodied in the rule as to make the hearing process a meaningful and important requirement?"¹³⁵ If the agency should only act on the matter after "informed reflection," the policies underlying § 553, its proscriptions, apply.¹³⁶

Because the determination of whether certain agency action is interpretive or legislative is classically case-specific,¹³⁷ it is instructive to examine how the courts have viewed varying fact situations in this context. In the case of *Saint Francis Memorial Hospital v. Weinberger*,¹³⁸ for example, the court found a change to be legislative because it imposed new substantive duties. The Secretary of Health and Human Services had issued a Provider Reimbursement Manual without following § 553 rulemaking procedures.¹³⁹ The Manual required hospitals to capitalize rather than expense interest, reversing previous practice.¹⁴⁰ The court compared the new regulations with the prior ones, noting that the new ones "clearly altered that state of affairs,"¹⁴¹ and that even the author of the Manual recognized the importance of the new requirement, as he placed it in italics.¹⁴² Further, because the Manual required hospitals to bear a much heavier burden in financing construction, and because the rule was to have retroactive application, the court concluded that the regulation had sufficient impact on the parties that it should be considered substantive.¹⁴³ Similarly, in *Pickus v. United States Board of Parole*,¹⁴⁴ the court held that guidelines used by the Parole Board establishing

¹³³ *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989).

¹³⁴ *Saint Francis Memorial Hosp. v. Weinberger*, 413 F. Supp. 323, 329 (N.D. Cal. 1976).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

¹³⁸ 413 F. Supp. 323, 329-30 (N.D. Cal. 1976).

¹³⁹ *Id.* at 326.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 329.

¹⁴² *Id.* at 329-30.

¹⁴³ *Saint Francis Memorial Hosp.*, 413 F. Supp. at 330.

¹⁴⁴ 507 F.2d 1107 (D.C. Cir. 1974).

factors for determining parole eligibility and "calculated to have a substantial effect on ultimate parole decisions" were not merely interpretive.¹⁴⁵ And in a case in which the court determined that manuals published by a federal agency requiring scrutiny by peer review organizations of hospitals receiving medicaid reimbursements were procedural and thus exempt from § 553's rulemaking procedures, the court gave direction to the scope of interpretive rules.¹⁴⁶ It explained that notice and comment would have been required had the manual inserted a new standard of review concerning the appropriate scrutiny, or had inserted a presumption of invalidity for certain operations.¹⁴⁷ Finally, when rules clearly have the force of law, a court will not sanction avoidance of § 553.¹⁴⁸

Cases that, on the other hand, have held new rules to be merely interpretive generally stress their explanatory nature and minimal effect on the existing regulatory scheme.¹⁴⁹ For example, in *Commonwealth of Pennsylvania v. United States*,¹⁵⁰ plaintiffs challenged a new Interstate Commerce Commission procedure created to simplify railroads' applications to abandon infrequently used lines. The procedure created certain rebuttable presumptions and, while the court conceded that the procedure placed the burden of going forward with evidence on the opponents of abandonment, it ruled that this streamlining did not affect the substance of the review procedure.¹⁵¹ And in *Continental Oil Co. v. Burns*,¹⁵² plaintiffs challenged a Federal Reserve Board interpretation letter issued to clarify a regulation, setting forth three criteria to be applied in determining whether a given charge fell within that regulation. The court held that the letter merely clarified the existing rule.¹⁵³ This conclusion was reiterated in another case in which agency regulations "tracked" the statutory re-

¹⁴⁵ *Id.* at 1112-13.

¹⁴⁶ *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987).

¹⁴⁷ *Id.* at 1051.

¹⁴⁸ *Aiken v. Obledo*, 442 F. Supp. 628 (E.D. Cal. 1977) (challenge to change in food stamp eligibility qualifications) ("The . . . rules . . . have the force of law. . . . [A] state agency implementing the Program must act in accordance with the instructions issued . . . as required by 7 CFR § 271.1(j), which provides: ' . . . Each State agency shall administer the program in accordance with . . . all . . . instructions issued pursuant thereto.' " *Id.* at 649 (emphasis added)).

¹⁴⁹ See *Independent Bankers Ass'n v. Federal Home Loan Bank Bd.*, 557 F. Supp. 23, 28-29 (D.C. Cir. 1982).

¹⁵⁰ 361 F. Supp. 208 (M.D. Pa.), *aff'd*, 414 U.S. 1017 (1973).

¹⁵¹ *Id.* at 215.

¹⁵² 317 F. Supp. 194 (D. Del. 1970).

¹⁵³ *Id.* at 198.

quirements, and thus were held to have "simply explained something the statute already required."¹⁵⁴

To argue that the DOL's Program Letters interpreting PRUCOL have had little effect on the regulatory scheme in the unemployment arena is, at best, disingenuous. These pronouncements are not mere reminders of what states already know about PRUCOL. They do not merely track the statute. Rather, they make substantial changes to the statute that are particularly harsh, not merely insignificant. And these changes have harmed applicants from jurisdictions that, prior to the Program Letters, had adopted a broad interpretation of PRUCOL. The changes wrought by these Letters, even in spite of state court decisions, are preventing otherwise qualified applicants from receiving urgently needed benefits. For example, in *Claimant v. Department of Employment and Training*,¹⁵⁵ the claimant met the rationale of *Holley v. Lavine*¹⁵⁶ as well as that of the state's highest court in *Cruz v. Commissioner of Public Welfare*,¹⁵⁷ which declared an individual to be PRUCOL when the INS is aware of that person's continued presence in the United States but institutes no measures to deport.¹⁵⁸ However, the claimant's petition was initially denied because of a finding that he did not prove PRUCOL status as newly defined by the Program Letters; he did not show that the INS knew of his presence and had provided him with written assurance that enforcement of deportation was not planned, nor that the INS had given him permission to remain in the United States indefinitely.¹⁵⁹ Not surprisingly, the wording of the initial denial tracked Massachusetts' own *Unemployment Insurance Service Representatives Handbook*,¹⁶⁰ which itself mirrors Program Letter 1-86, Change 1, almost verbatim.¹⁶¹ These Program Letters do not represent mere procedural

¹⁵⁴ *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984) (discussing eligibility standards for participation in a school care program).

¹⁵⁵ Decision of Board of Review, Appeal No. BR-50412-OP (Mass. Dep't Employment & Training Dec. 10, 1992).

¹⁵⁶ 553 F.2d 845 (2d Cir. 1977), *cert. denied*, 435 U.S. 947 (1978).

¹⁵⁷ 478 N.E.2d 1262 (Mass. 1985).

¹⁵⁸ *Id.* at 1266.

¹⁵⁹ Decision of Board of Review, Appeal No. BR-50412-OP (Mass. Dep't Employment & Training Dec. 10, 1992).

¹⁶⁰ See *supra* note 65. As does the DOL with its Program Letters, the Massachusetts Department of Employment and Training issues local office bulletins without the benefit of state-enacted APA procedures.

¹⁶¹ To be in PRUCOL status, an alien must meet a two-part test. First, the alien must be residing in the U.S. "under color of law." For an alien to be residing "under color of law," the INS must know of the alien's presence, and must provide the alien with written assurance that enforcement of deportation is not planned. Second, the alien must be "permanently residing" in the U.S.

streamlining, as in *Commonwealth of Pennsylvania v. United States*.¹⁶² On the contrary, the DOL's actions in issuing these Program Letters constitute anything but streamlining the adjudication procedure. What has resulted is confusion among state unemployment agencies, including those whose high courts follow the expansive *Holley* definition. Many now suffer the implicit threat of decertification if they are seen as not acquiescing to the often conflicting yet compelling "opinion" by the very federal agency that certifies their participation in the federal unemployment insurance program, participation that is vital to their economies.¹⁶³ What we have here is precisely the situation in which the court in *American Hospital Ass'n* required notice and comment: a presumption of invalidity has been created when reviewing certain unemployment applications, where previously many would have been approved. Moreover, the DOL's so-called interpretive rules contrast with those involved in *Continental Oil*, as the DOL is not merely stating criteria to be applied in determining whether someone is PRUCOL; rather, the DOL is altering criteria that have already been implemented in many jurisdictions. Rather than clarify the meaning of PRUCOL, as did the interpretations regarding the regulation in *Continental Oil*, the Program Letters have only obfuscated that meaning. Finally, by making these changes, the DOL is legislating by establishing factors for determin-

Therefore, an alien living in the U.S. who has not received assurance from the INS that departure will not be enforced is not permanently residing.

Unemployment Insurance Program Letter No. 1-86, Change 1 (U.S. Dep't Labor, Employment & Training Admin. Feb. 16, 1989). "[A]n alien is in PRUCOL status only if the INS has affirmatively exercised its discretion against deportation and granted permission to the alien in writing to reside in the U.S. indefinitely." *Id.*

It is both interesting and disturbing to note that in issuing Program Letter 1-86, Change 1, the DOL had to dig to find support for its new definition of PRUCOL. It finally found it only in the case of *Sudomir v. McMahon*, see *supra* note 51 and accompanying text, and in one other case, *Esparza v. Valdez*, 612 F. Supp. 241 (D. Colo. 1985), *aff'd*, 862 F.2d 788 (10th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989). The lack of support around the country for the DOL's position says much about the probable reasons why the DOL chose to "enact" this change the way it did.

¹⁶² 361 F. Supp. 208 (M.D. Pa.), *aff'd*, 414 U.S. 1017 (1973).

¹⁶³ This should not be considered an idle threat. It has been said to be "a drastic remedy which benefits no one." *Dunn v. New York State Dep't of Labor*, 474 F. Supp. 269, 275 n.6 (S.D.N.Y. 1979). While to date it appears that the DOL has not decertified a state because of failure to comply with these rulings on PRUCOL, apparently only California has explicitly, by regulation, adopted a PRUCOL definition different than the DOL's. Most have apparently done what Massachusetts has done; in spite of its high court ruling following *Holley's* broad lead, the state unemployment agency has adopted the mandates of Program Letter 1-86 and Program Letter 1-86, Change 1, as its basis on which to determine PRUCOL status. See *supra* notes 160-61 and accompanying text.

ing PRUCOL eligibility that have a substantial effect on PRUCOL decisions, as did the changes in parole eligibility made in *Pickus* that were finally determined to be legislative.

In deciding whether to accept an agency's characterization of a rule as interpretive, the courts are not bound by an administrative agency's classification of its own actions;¹⁶⁴ they look beyond that, to whether the interpretation attempts to define a standard established by authorities outside the agency and therefore has the force and effect of a substantive rule. In such cases, the courts require § 553 procedures to be followed.¹⁶⁵ An agency cannot outflank, by definitional fiat, either the strictures of its enabling legislation or the APA's rulemaking framework.¹⁶⁶ Substance is determinative.¹⁶⁷ Thus, in *Federal Farm Credit Banks Funding Corp. v. Farm Credit Administration*,¹⁶⁸ the court was not convinced by the Farm Credit Administration's characterization of a change in an accounting bulletin as merely interpreting generally accepted accounting principles. The court instead found the bulletin to be a substantive rule, as it set standards for the accounting profession that were different from those previously used, defined criteria for proper accounting, and had the force of law, by requiring its member institutions to immediately cease certain accounting practices.¹⁶⁹

The case of *Lewis-Mota v. Secretary of Labor*¹⁷⁰ illustrates how courts look not merely at what an agency claims it is doing, but to what the agency actually does. In *Lewis-Mota*, the DOL had issued a directive suspending its "precertification" list (those occupations that suffered from a shortage of American workers, lowering the degree of evidence required for an employer to hire a noncitizen worker).¹⁷¹ The directive, which was not published in the Federal Register until a year after issuance, forced noncitizen applicants to submit proof of specific job offers as well as a statement of their qualifications for those jobs, making it "more difficult for employers to fill vacancies in

¹⁶⁴ See, e.g., *CBS, Inc. v. United States*, 316 U.S. 407, 416 (1942); *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972); *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 743-45 (3d Cir. 1969).

¹⁶⁵ *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 207-08 (4th Cir. 1989).

¹⁶⁶ *Zuber v. Allen*, 396 U.S. 168, 192-94 (1969).

¹⁶⁷ *Chamber of Commerce v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980).

¹⁶⁸ 731 F. Supp. 217 (E.D. Va. 1990).

¹⁶⁹ *Id.* at 223.

¹⁷⁰ 469 F.2d 478 (2d Cir. 1972).

¹⁷¹ *Id.* at 480.

the occupations no longer precertified."¹⁷² The Court of Appeals for the Second Circuit ruled that the directive had changed existing rights and obligations, had a significant impact on those it regulated, and, because no exceptions to the publication requirement were applicable (rejecting the argument that it was a statement of general policy), would be valid only if the statement were promulgated as a regulation, with the required notice and comment period.¹⁷³

In view of the above discussion, it is clear that the change the DOL has foisted on the states is equally substantive. First, this new "interpretation" of PRUCOL is an attempt to define a standard already established by authorities outside the agency—by Congress in choosing to accept the courts' definition of PRUCOL and not define it more specifically, and by the state and federal courts themselves. Second, this change has the force and effect of a substantive rule. The Program Letters implicitly threaten to decertify those states that do not toe the line. The mandatory terms are unambiguously expressed in the Program Letters:

INS Inaction [sic] is *not* sufficient to show that an alien is present under color of law and States *may not* interpret it as such.

. . . .

. . . [N]o amendments to State law are necessary for States to remain *in conformity with* these FUTA requirements *unless* State or Federal courts construe the State law in a manner inconsistent with the Department's interpretation of Section 3304(a)(14)(A). State administrators are requested to *take necessary action to assure* that the State law continues to be applied consistently with Section 3304(a)(14)(A), FUTA, as interpreted in this letter.¹⁷⁴

"[T]he State *may not* expand the definition of PRUCOL to include aliens who merely possess work authorization. . . . State administrators are requested to *take necessary action to assure* that the State law is applied consistently with section 3304(a)(14)(A), FUTA, as in-

¹⁷² *Id.* at 482.

¹⁷³ *Id.*

¹⁷⁴ Unemployment Insurance Program Letter No. 1-86 (U.S. Dep't Labor, Employment & Training Admin. Oct. 28, 1985), 51 Fed. Reg. 29,713, 29,716 (1986) (second and third emphases added).

terpreted in this program letter."¹⁷⁵ "[A] State *may not* broaden the definition of any of the three categories of eligible aliens."¹⁷⁶

These mandates mirror those involved in the food stamp case of *Aiken v. Obledo*,¹⁷⁷ which the court held to have the force of law. The words unambiguously *attempt to* give the PRUCOL provisions in the Program Letters the force and effect of law, as did the bulletin in the *Federal Farm Credit* case.¹⁷⁸

Third, like the bulletin in the case of *Federal Farm Credit*¹⁷⁹ and the manual in the case of *Saint Francis Memorial Hospital*,¹⁸⁰ the DOL Program Letters impose new obligations on noncitizen unemployment applicants by establishing new and far more burdensome standards they must satisfy in order to prove they are in PRUCOL status. These standards are far more difficult to fulfill than those already established by an overwhelming majority of jurisdictions. For example, Program Letters 1-86 and 1-86, Change 1, require that "the INS must know of the alien's presence, *and* must provide the alien with official assurance that enforcement of deportation is not planned [by way of] a letter or other document" to the alien.¹⁸¹ The Program Letters baldly assert that where appeals boards or courts have ruled aliens to be in PRUCOL status and where the INS knows of their alleged illegal presence in the United States but has taken no action to deport, these rulings do not conform with the intent of FUTA.¹⁸² Thus, "INS Inaction [sic] is *not* sufficient to show that an alien is present under color of law and *States may not interpret* it as such."¹⁸³ This interpretation contradicts those of at least eight courts, both state and federal, that have already held the opposite to be the

¹⁷⁵ Unemployment Insurance Program Letter No. 1-86, Change 1 (U.S. Dep't Labor, Employment & Training Admin. Feb. 16, 1989) (emphasis added).

¹⁷⁶ Unemployment Insurance Program Letter No. 49-89 (U.S. Dep't Labor, Employment & Training Admin. Aug. 24, 1989) (emphasis added).

¹⁷⁷ 442 F. Supp. 628, 649-50 (E.D. Cal. 1977).

¹⁷⁸ See *Federal Farm Credit Banks Funding Corp. v. Farm Credit Admin.*, 731 F. Supp. 217, 219 (E.D. Va. 1990).

¹⁷⁹ *Id.*

¹⁸⁰ 413 F. Supp. 323, 326 (N.D. Cal. 1976).

¹⁸¹ Unemployment Insurance Program Letter No. 1-86, Change 1 (U.S. Dep't Labor, Employment & Training Admin. Feb. 16, 1989); Unemployment Insurance Program Letter No. 1-86 (U.S. Dep't Labor, Employment & Training Admin. Oct. 28, 1985), 51 Fed. Reg. 29,713, 29,716 (1986).

¹⁸² Unemployment Insurance Program Letter No. 1-86, Change 1 (U.S. Dep't Labor, Employment & Training Admin. Feb. 16, 1989); Unemployment Insurance Program Letter No. 1-86 (U.S. Dep't Labor, Employment & Training Admin. Oct. 28, 1985), 51 Fed. Reg. 29,713, 29,716 (1986).

¹⁸³ Unemployment Insurance Program Letter No. 1-86, Change 1 (U.S. Dep't Labor, Employment & Training Admin. Feb. 16, 1989); Unemployment Insurance Program Letter No. 1-86

law.¹⁸⁴ How can these Program Letters represent anything other than substantive changes in the law?

The new requirements imposed by the DOL are particularly pernicious because they place burdens on noncitizens that most cannot meet. The INS does not routinely provide official assurances in writing, as this would foreclose the INS' options.¹⁸⁵ Thus, any noncitizen seeking unemployment benefits in a state whose unemployment agency follows these Program Letters is faced with meeting a much higher, and often truly impossible standard, notwithstanding the more expansive definition of PRUCOL set forth by the judiciary. This surely cannot be what Congress intended when it first imposed the PRUCOL requirement in 1972.

Fourth, this change has a significant impact on those regulated, noncitizen workers who apply for unemployment benefits. It affects all who are neither permanent residents, nor fit within certain categories of noncitizens who do have official written assurance that they may stay in the United States permanently. It applies to all applicants for adjustment of status, applicants granted voluntary departure, applicants for withholding of deportation, visa applicants and

(U.S. Dep't Labor, Employment & Training Admin. Oct. 28, 1985), 51 Fed. Reg. 29,713, 29,716 (1986) (emphasis added).

¹⁸⁴ *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985); *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947 (1978); *Velasquez v. Secretary of the Dep't of Health & Human Servs.*, 581 F. Supp. 16 (E.D.N.Y. 1984); *Vazquez v. Review Bd. of Ind. Employment Sec. Div.*, 487 N.E.2d 171 (Ind. Ct. App. 1985); *Cruz v. Commissioner of Pub. Welfare*, 478 N.E.2d 1262 (Mass. 1985); *Saint Francis Hosp. v. D'Elia*, 422 N.Y.S.2d 104 (App. Div. 1979), aff'd, 422 N.E.2d 830 (N.Y. 1981); *Papadopoulos v. Shang*, 414 N.Y.S.2d 152 (App. Div. 1979); *Rubio v. Employment Div.*, 674 P.2d 1201 (Or. Ct. App. 1984); *Antillon v. Department of Employment Sec.*, 688 P.2d 455 (Utah 1984).

In fact, when the petitioner in *Holley* unsuccessfully appealed to the Supreme Court for certiorari, the federal government, in its amicus brief, asserted that the term "under color of law" encompasses those whose residence in the United States is "'continued by virtue of official permission or acquiescence.'" *Berger*, 771 F.2d at 1576. This definition, however, was first contradicted by the DOL in 1985, when it started issuing Program Letters requiring affirmative action by the INS in order to prove color of law status. When one recognizes that these changes came at the height of the conservative Reagan administration it becomes clear that principles of politics rather than those of law were operating within the DOL in 1985. During that administration, the federal government was trying to shrink the numbers of those collecting "government benefits" such as unemployment; the administration was also trying to make the climate unfriendly to those beyond the borders. Given that the DOL's actions came at about the same time as did the vast change in immigration law represented in IRCA, which neither addressed nor altered the widely accepted view of PRUCOL, it becomes clearer why the DOL began to rewrite the meaning of PRUCOL from within its walls.

¹⁸⁵ "[P]laintiff is in . . . a minuscule sub-class of aliens who, although unlawfully residing in the United States, are each individually covered by a letter from the Department of Justice stating that the Immigration and Naturalization Service 'does not contemplate enforcing . . . [the alien's] . . . departure from the United States at this time.'" *Holley*, 553 F.2d at 849.

beneficiaries of visa petitions (even if approved), applicants for suspension of deportation, and applicants for political asylum.¹⁸⁶

Rules that are labeled as procedural are not precluded from being treated as substantive. Procedural rules, the second exception to § 553, relate to the method of operation of an agency,¹⁸⁷ and hence are not subject to rulemaking requirements.¹⁸⁸ But the distinction between a rule of procedure and one of substance is not black and white.¹⁸⁹ For example, in *Pharmaceutical Manufacturers Ass'n v. Finch*,¹⁹⁰ the court held that, even though certain changes appeared to be procedural, they were truly substantive. The court reached this conclusion because the changes were to have a pervasive and substantial impact on the industry, and because there was a question of the wisdom of making the changes.¹⁹¹ Thus, the court concluded, the public needed to be made aware of and be allowed to have a voice in formulating the rule.¹⁹²

Similarly, in *National Motor Freight Traffic Ass'n v. United States*,¹⁹³ the court held that a reparation procedure established by the Interstate Commerce Commission could not be put into effect until the agency complied with § 553, because the procedure would have a substantial impact on the plaintiffs by permitting informal adjudication of the legality of rates that were of industry-wide application, where a recently enacted statute created a judicially-enforceable right to recover illegal overpayments. Creating this new procedure, the court said, would be a "significant step in the implementation of the newly-conferred statutory judicial remedy."¹⁹⁴ Further, in a suit challenging the administration of the Food Stamp Act, a requirement, departing from prior practice, that the eligibility worker obtain as many collateral contacts as she or he chose prior to certifying a food stamp applicant, was considered substantive.¹⁹⁵ While the rule was procedural in detailing the tasks of the eligibility worker, it was truly substantive in light of the purpose of the program, "to provide a

¹⁸⁶ Unemployment Insurance Program Letter No. 1-86, Change 1 (U.S. Dep't Labor, Employment & Training Admin. Feb. 16, 1989).

¹⁸⁷ *Kessler v. FCC*, 326 F.2d 673, 680-81 (D.C. Cir. 1963).

¹⁸⁸ See *Aiken v. Obledo*, 442 F. Supp. 628, 649-50 (E.D. Cal. 1977).

¹⁸⁹ *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 909 (5th Cir. 1983).

¹⁹⁰ 307 F. Supp. 858 (D. Del. 1970).

¹⁹¹ *Id.* at 864-68.

¹⁹² *Id.* at 868.

¹⁹³ 268 F. Supp. 90 (D.D.C. 1967), *aff'd*, 393 U.S. 18 (1968).

¹⁹⁴ *Id.* at 97.

¹⁹⁵ *Aiken v. Obledo*, 442 F. Supp. 628, 649 (E.D. Cal. 1977).

means of delivering food to the utterly destitute without the human suffering that accompanies bureaucratic delays."¹⁹⁶

No serious argument can be made that the changes made by the Program Letters are merely procedural. As discussed, these changes have had, and will continue to have, substantial impact on the foreign unemployment applicant. In addition, there is surely a question of the wisdom of altering standards that have been in effect, standards that the courts have been developing since 1977.¹⁹⁷ And, like the case of *National Motor Freight Traffic Ass'n v. United States* discussed above,¹⁹⁸ the recently enacted IRCA statute, which again did not define PRUCOL, can be said to have effectively created a judicially-enforceable right to be declared to be in PRUCOL status if the particular jurisdiction in which the unemployment application was filed followed the overwhelming majority of jurisdictions in interpreting PRUCOL broadly. Finally, any claim that this rule is procedural fails given the purpose of the unemployment program: to prevent destitution in periods between employment, and the fact that this rule hinders that purpose by denying benefits to otherwise eligible workers.

Many courts have found that even a rule which is fairly characterized as procedural does not fall within the exception to notice and comment requirements if it constitutes a departure from existing practice that has a substantial impact on those regulated.¹⁹⁹ So, in *Aiken v. Obledo*,²⁰⁰ the court decided that the changes imposed by the rule, even if procedural, would not be exempted from the notice and comment requirements. While the "substantial impact" question lost some vitality during the 1980s, beginning with *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*²⁰¹ and followed by the District of Columbia and Ninth Circuits,²⁰² the legacy of *Vermont Yankee* is that courts cannot require procedures

¹⁹⁶ *Id.*

¹⁹⁷ See *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977), *cert. denied*, 435 U.S. 947 (1978). Cases following the reasoning of *Holley* provide further support. See *supra* note 41.

¹⁹⁸ See *supra* notes 193-94 and accompanying text.

¹⁹⁹ See *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972); see also 5 U.S.C. § 552(a)(1) (noting that "substantial impact" does not appear in the statute); *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969).

²⁰⁰ 442 F. Supp. 628 (E.D. Cal. 1977).

²⁰¹ 435 U.S. 519 (1978) (questioning whether notice and comment could be judicially required where not mandated by the APA).

²⁰² *Cabais v. Egger*, 690 F.2d 234, 237-38 (D.C. Cir. 1982) (DOL did not have to comply with notice and comment requirements before issuing a Program Letter directive detailing offset of pension payments). "Simply because agency action has substantial impact does not mean it is subject to notice and comment if it is otherwise expressly exempt under the APA." *Id.* at 237;

of an agency beyond those contemplated by the APA.²⁰³ All this means, though, is that agency action that has a substantial impact is only exempted from notice and comment requirements if it is otherwise expressly exempt under the APA.²⁰⁴ Further, rejection of the substantial impact test has been limited to questions of interpretive rules,²⁰⁵ so there is no reason to doubt the vitality of the substantial impact test as one of several criteria for evaluating claims of APA exemption.²⁰⁶ The substantial impact test remains the "primary means by which courts look beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation."²⁰⁷

The DOL's promulgation of Program Letters interpreting PRUCOL represents a clear departure from existing practice that has a substantial impact on those regulated. The departure—requiring for proof of PRUCOL status that the INS provide a noncitizen with official written assurance that enforcement of deportation is not planned, as well as proof that the claimant may stay in the United States indefinitely—is far different from the requirements that governed previously. The substantial impact—narrowing unemployment benefit eligibility—effectively cuts off availability of any source of income for many noncitizen workers who are not lawful permanent residents. Jobless, without unemployment benefits, they are left with no source of income. They cannot accept welfare benefits because that would provide the INS with grounds to exclude them from attaining immigrant status because they may become public charges.²⁰⁸

General statements of policy represent the final exemption from the notice and comment requirements of § 553. These statements either "presage[] an upcoming rulemaking or announce[] the course [an] agency intends to follow in future adjudications,"²⁰⁹ allowing it to be free to exercise its discretion.²¹⁰ They provide "a formal method

see *Rivera v. Becerra*, 714 F.2d 887 (9th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984). But see *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970).

²⁰³ *Vermont Yankee*, 435 U.S. at 546.

²⁰⁴ *Rivera*, 714 F.2d at 890-91; *Cabais*, 690 F.2d at 237.

²⁰⁵ *Cabais*, 690 F.2d at 237-38.

²⁰⁶ See *Batterton v. Marshall*, 648 F.2d 694, 709 n.83 (D.C. Cir. 1980).

²⁰⁷ *United States Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984); see KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 7:17-7:18 (2d ed. 1979).

²⁰⁸ See 8 U.S.C. § 1182(a)(4) (Supp. III 1991).

²⁰⁹ *Pacific Gas & Elec. v. Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974); accord *Independent Bankers Ass'n v. Federal Home Loan Bank Bd.*, 557 F. Supp. 23, 29 (D.C. Cir. 1982).

²¹⁰ *Independent Bankers*, 557 F. Supp. at 29.

by which an agency can express its views,"²¹¹ encouraging public dissemination of the policies prior to their application in individual situations. This keeps the agency's views out in the open, disclosed in advance of their application. Further, publication of these policy statements facilitates long range planning in the regulated industry.²¹² But, "[a]n agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy."²¹³ In *Aiken v. Obledo*, where the court found that the collateral contact rule imposed a binding precedent on the emergency food stamp applicant, and had a substantial impact on those seeking emergency food stamp certification, the rule was not considered a mere statement of policy.²¹⁴

It is often difficult to discern what constitutes a general statement of policy, and the "Supreme Court has yet to offer a definitive test."²¹⁵ As with other § 553 exemptions, the cases often turn on their facts.²¹⁶ Courts often harken back to the purpose of public rulemaking in order to determine whether a pronouncement is truly a general statement of policy and hence not demanding the safeguards of public rulemaking procedures. The benefits of these procedures are balanced against other considerations, to see whether any true benefits would accrue as a result of public rulemaking.²¹⁷ Are the policies promoted by public participation outweighed by the "countervailing considerations of effectiveness, efficiency, expedition, and reduction in expense"?²¹⁸ In balancing these factors, the courts determine whether, despite the reluctance to dispense with the public process, Congress intended to alter the balance. Courts tend to find a general policy when the agency is left free to exercise its own discretion whether or not to follow the policy in individual cases, i.e. when the policy does not establish a "binding norm."²¹⁹ Only when the agency or its official is not bound to apply an "airtight rule in a given case"²²⁰ is the statement considered a policy, not a rule.

²¹¹ *Pacific Gas & Elec.*, 506 F.2d at 38.

²¹² *Id.*

²¹³ *Id.* at 38-39.

²¹⁴ *Aiken v. Obledo*, 442 F. Supp. 628, 653 (E.D. Cal. 1977).

²¹⁵ *Jean v. Nelson*, 711 F.2d 1455, 1480 (11th Cir. 1983), *aff'd*, 472 U.S. 846 (1985).

²¹⁶ See *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987).

²¹⁷ *Jean*, 711 F.2d at 1481.

²¹⁸ *Id.*

²¹⁹ *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Insur. Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978).

²²⁰ *Jean*, 711 F.2d at 1482.

Often courts look to the purpose of the purported policy as well as its anticipated impact to determine whether it truly is a policy. In *Columbia Broadcasting System, Inc. v. United States*,²²¹ for example, the Supreme Court decided that a purported statement of policy was truly a substantive rule. There, Columbia sued the Federal Communications Commission ("FCC") when it promulgated regulations that would require refusal to grant or renew a license to any station that entered into certain types of contracts with a chain broadcasting network like the one Columbia represented.²²² After extensive public hearings, the FCC promulgated the regulations, which it claimed merely announced a general policy, similar to a press release. But the regulations had the force of law, and had an immediate, significant impact on the business, causing prompt cancellation of or failure to renew Columbia's contracts, and seriously affecting its organization.²²³ When *Columbia Broadcasting* is compared with *Pacific Gas & Electric v. Federal Power Commission*,²²⁴ where changes would occur only after individual curtailment plans were filed and approved by the Federal Power Commission, and where the effect was only a possibility that the plaintiffs might receive a lower curtailment priority at some future time, it becomes clear that the impact of the regulations in *Columbia Broadcasting* is significant and immediate.

*Brown Express, Inc. v. United States*²²⁵ represents yet another case in which a court rejected the government's attempts to avoid adherence to the APA. The court there was convinced not by the agency's claims that its actions were merely general statements of policy or procedural in nature, but by the immediate effect of the actions. In *Brown Express*, the court was called upon to decide whether an Interstate Commerce Commission ("ICC") Notice eliminating certain notification procedures, effective a mere fifteen days after issuance, violated the APA.²²⁶ The practice of notifying existing competing carriers pending "emergency temporary authority" by the ICC had persisted for forty years.²²⁷ In ruling that neither the APA exception for general statements of policy nor for procedural rules applied, the court explained that this was not a mere announcement of policy that the ICC hoped to implement in the future; rather, im-

²²¹ 316 U.S. 407 (1942).

²²² *Id.* at 413.

²²³ *Id.* at 422.

²²⁴ 506 F.2d 33 (D.C. Cir. 1974).

²²⁵ 607 F.2d 695 (5th Cir. 1979).

²²⁶ 607 F.2d 695, 698-99 (5th Cir. 1979).

²²⁷ *Id.* at 698.

mediately upon the effective date, a forty year practice of giving notice was no longer to be followed.²²⁸ Because of this, the court reasoned that "[a]n announcement stating a change in the method by which an agency will grant substantive rights is not a 'general statement of policy.'"²²⁹

The changes wrought to the definition of PRUCOL by these Program Letters similarly cannot be excused from notice and comment rulemaking as general statements of policy. Nowhere in any of the relevant Program Letters does the DOL state, or even imply, that they merely reflect its intention regarding future rulemaking. In fact, the opposite is clear by the wording at both the outset and the conclusion of the Letters: each begins with the reminder, in the Background section, of the requirements of FUTA § 3304(a)(14)(A) as a condition for the Secretary of Labor's certification of a state.²³⁰ Each ends with the warning: "State administrators are requested to take necessary action to assure that the State law continues to be applied consistently with section 3304(a)(14)(A), FUTA, as interpreted in this letter."²³¹ Program Letter 1-86 goes even further, stating in a paragraph entitled Action Required that, given that all state laws

currently provide for the payment of unemployment compensation to aliens under the terms specified by section 3304(a)(14)(A), FUTA, . . . no amendments to State law are necessary for States to remain in conformity with these FUTA requirements *unless State or Federal courts construe the State law in a manner inconsistent with the Department's interpretation of Section 3304(a)(14)(A)*. State administrators are requested to take necessary action to assure that the

²²⁸ *Id.* at 701.

²²⁹ *Id.* The court relied upon the Supreme Court, which had indicated that the notice and comment provisions "were designed to assure fairness and mature consideration of rules of general application." *Id.* (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)). Further, in ruling the change was substantive and not merely procedural, the court, quoting *Pharmaceutical Manufacturers Ass'n v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970), stated: "[W]hen a proposed regulation of general applicability has a *substantial impact* on the regulated industry, or an important class of the members . . . notice and opportunity for comment should first be provided." *Id.* at 702.

²³⁰ Unemployment Insurance Program Letter No. 49-89 (U.S. Dep't Labor, Employment & Training Admin. Aug. 24, 1989); Unemployment Insurance Program Letter No. 1-86, Change 1 (U.S. Dep't Labor, Employment & Training Admin. Feb. 16, 1989); Unemployment Insurance Program Letter No. 1-86 (U.S. Dep't Labor, Employment & Training Admin. Oct. 28, 1985), 51 Fed. Reg. 29,713 (1986).

²³¹ Unemployment Insurance Program Letter No. 1-86, Change 1 (U.S. Dep't Labor, Employment & Training Admin. Feb. 16, 1989); Unemployment Insurance Program Letter No. 1-86 (U.S. Dep't Labor, Employment & Training Admin. Oct. 28, 1985), 51 Fed. Reg. 29,713 (1986).

State law continues to be applied consistently with . . .
FUTA.²³²

There is no future intention here, except perhaps to decertify a state that does not obey the DOL's dictates. Given this mandate, state agencies have been left without any discretion whatsoever, but rather must apply the dictates of the Program Letters or else.²³³ Nor are the Program Letters, in any manner, tentative. They clearly state the DOL's decision regarding the meaning of PRUCOL, just as the regulation did in *Columbia Broadcasting System*. Surely the impact on the noncitizen unemployment applicant of these new PRUCOL rules is as substantial as was elimination of the practice of notification in *Brown Express*. Moreover, like the changes in *Brown Express* and *Columbia Broadcasting System*, the impact of the new rule has been serious and immediate. Unlike *Pacific Gas & Electric*, where the purpose of the statement was to give advance notice of a policy, the purpose here is to inform the states how they must apply the PRUCOL requirement. And finally, these Letters are an attempt by the DOL to create a binding norm, by the pretextual claim that the new norms are merely interpretive or a matter of policy.²³⁴

In the unlikely event that these Program Letters might be considered to fall within one of the exceptions to the notice and comment requirements of § 553, they are nonetheless "substantive rules of gen-

²³² Unemployment Insurance Program Letter No. 1-86 (U.S. Dep't Labor, Employment & Training Admin. Oct. 28, 1985), 51 Fed. Reg. 29,713 (1986) (emphasis added).

²³³ "The purpose of this program letter is to ensure that section 3304(a)(14)(A), FUTA, is uniformly interpreted and applied. Some of the information provided below has also been issued in earlier directives." Unemployment Insurance Program Letter No. 1-86 (U.S. Dep't Labor, Employment & Training Admin. Oct. 28, 1985), 51 Fed. Reg. 29,713 (1986) (emphasis added). "INS Inaction [sic] is *not* sufficient to show that an alien is present under color of law and States *may not* interpret it as such." *Id.* (second emphasis added). "[T]he filing of an application alone cannot change an alien's resident status." *Id.* "[A]n alien living in the United States who has not received assurance from the INS that departure will not be enforced is not permanently residing. INS inaction is *not* sufficient to show that an alien is in PRUCOL status and states *may not* interpret it as such." Unemployment Insurance Program Letter No. 1-86, Change 1 (U.S. Dep't Labor, Employment & Training Admin. Feb. 16, 1989) (second emphasis added). "[A] state *may not* broaden the definition of any of the three categories of eligible aliens." Unemployment Insurance Program Letter No. 49-89 (U.S. Dep't Labor, Employment & Training Admin. Aug. 24, 1989).

²³⁴ In a November 9, 1992 conversation concerning publication dates of the various Program Letters with Walter Baran, the Department of Labor's Unemployment Insurance Federal Representative to Massachusetts, Mr. Baran stated, "[t]hey're all binding on the states. . . . As far as we're concerned, it doesn't make a difference whether they are or they're not [published]. If they [the states] didn't [comply], we'd probably raise an issue with the state, under whatever provision of the law applied." Telephone Interview with Walter Baran, Department of Labor's Unemployment Insurance Representative to Massachusetts (Nov. 9, 1992).

eral applicability,"²³⁵ and as such must be published in the Federal Register "for the guidance of the public" pursuant to § 552(a)(1).²³⁶ Rules of general applicability constitute a change from existing practice and have a significant impact on the general public or a segment of those regulated.²³⁷ When an agency pronouncement requires that affected parties be informed of its provisions, publication under § 552(a)(1)(D) is mandatory.²³⁸ Applying these principles in *Aiken v. Obledo*,²³⁹ the court found the collateral contact rule to be one of general applicability, as it changed existing practice (which had not required a minimum of one collateral contact before certifying an applicant), and would have a substantial impact on a segment of those regulated (families seeking emergency food stamp issuance subjected to indefinite delays in obtaining adequate diet).

Similarly, these Program Letters constitute rules of general applicability that should, at a minimum, have been published in the Federal Register. Until now the concept of PRUCOL, as interpreted by state unemployment agencies, was informed by the practicalities of immigration law and the developing case law in their jurisdictions and around the country. Now the DOL seeks not only to direct states how to interpret PRUCOL, but to do so even when many of them are already working with a court-sponsored definition. This surely represents a substantial change from existing practice. Further, like the food stamp applicants in *Aiken* and *Anderson*, this change also has had a significant and immediate impact on a large segment of noncitizen unemployment applicants, who are likely to be denied PRUCOL findings because of the DOL's reinterpretation,²⁴⁰ which has imposed burdens of proof often incapable of being met.

²³⁵ 5 U.S.C. § 552(a)(1)(D) (1988). This section also provides that statements of general policy or interpretations of general applicability must be published in the Federal Register, but, if § 553 exemptions apply on either of these bases, publication would not be required anyway (except interpretations of general applicability). Thus, concentration here is only on substantive rules of general applicability. The study of the distinctions between interpretive rules and interpretive rules of general applicability has not been a particularly fruitful one, as neither statutes, legislative histories, nor courts are helpful. *Davis, supra* note 207, § 5:11.

²³⁶ Without actual and timely notice of the terms of a matter required to be published in the Federal Register, one may not be adversely affected by such a matter not so published. 5 U.S.C. § 552(a)(1) (1988).

²³⁷ *Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977); *National Ass'n of Concerned Veterans v. Secretary of Defense*, 487 F. Supp. 192, 200 (D.D.C. 1979).

²³⁸ See *Hark v. Dragon*, 477 F. Supp. 308, 315 (D. Vt.), *aff'd*, 611 F.2d 11 (2d Cir. 1979).

²³⁹ 442 F. Supp. 628, 653 (E.D. Cal. 1977).

²⁴⁰ The exception to the publication requirement in this instance, when the persons subject to the rules are either "personally served or otherwise have actual notice" of the regulation, 5 U.S.C. § 553(b) (1988), does not apply in this case. The argument that the persons subject to the new rules are the state agencies, and that sending these Program Letters to those agencies

Assuming that all that is required of the DOL under the APA is publication of these Program Letters in the Federal Register, the next question is whether the DOL has satisfied even that minimal requirement. A review of the timing of the publications compels the only possible conclusion: the DOL has not met even this minimal APA standard. When should these "interpretations" have been published? Section 552(a)(1)(D) does not specify precisely whether publication should occur prior to the effective date, upon the effective date, or subsequent to it. The section uses the term "currently," but does not define it. Nonetheless, guidance is provided under the terms of § 552(a)(2), which discusses what documents agencies must make available for public inspection and copying, and requires prompt publication "quarterly or more frequently."²⁴¹ Thus, the APA strongly suggests that items required to be published must appear as soon as possible following an effective date.

Were the Program Letters at issue here published in the Federal Register in a timely fashion? Apparently not all were even published. Among the pertinent Program Letters, the following details have been unearthed: Program Letter 1-86, dated October 28, 1985, expiration date March 31, 1987, was published August 20, 1986;²⁴² Program Letter 12-87, dated March 11, 1987, expiration date March 31, 1988, was published February 2, 1987;²⁴³ Program Letter 12-87, Change 1, dated September 28, 1988, apparently unpublished; Program Letter 1-86, Change 1, dated February 16, 1989, expiration date June 30, 1991, published June 28, 1991;²⁴⁴ Program Letter 49-89, dated August 24, 1989, expiration date June 30, 1991, apparently unpublished. Program Letter 1-86 was not published until 10 months after its effective date, and 1-86, Change 1, the Letter of most signifi-

qualifies for this exception, fails for a few reasons. First, the unemployment claimants who are subject to these new PRUCOL rules are the true persons in interest, and they do not receive these Program Letters. Even if the states were the persons subject to these rules, they have not received proper notice to justify an exception. While the state unemployment agencies may have been sent these Letters, these mailings were at best unofficial and of uncertain reliability. A recent case has relied upon this reasoning. In *Cosby v. Ward*, 843 F.2d 967, 980 (7th Cir. 1988), the claim was raised that the persons subject to the rule were either personally served or otherwise had actual notice. But the court ruled that just because the states were sent a copy of the Program Letter, this did not bring the case within the exception to the publication requirement, as the addresses of the Letters did not have the sort of personal service that would permit the documents to be treated as regulations. *Id.*

²⁴¹ 5 U.S.C. § 552(a)(2) (1988).

²⁴² 51 Fed. Reg. 29,713 (1986).

²⁴³ 52 Fed. Reg. 3889 (1987).

²⁴⁴ 56 Fed. Reg. 29,719 (1991).

cance, was not published until 28 months after its effective date. Surely this cannot be deemed compliance with the statute.

By publishing these Program Letters without satisfying either the notice and comment requirements of § 553, or even the de minimus publication requirements of § 552(a)(1)(D), the DOL is effectively thwarting the will of Congress, and is trying to alter the meaning of PRUCOL for thousands of noncitizen unemployment applicants without subjecting its new, restrictive definition to the fair scrutiny of the public. By its actions, the DOL has clearly violated the requirements of the APA.

V. PROCEDURAL DUE PROCESS WAS VIOLATED BY THE DOL'S
PROMULGATION OF RULES WITHOUT FOLLOWING
THE PROPER PROCEDURE

While it is a nation's fundamental right to exclude or admit foreigners into its borders, once foreigners are inside the United States, whether legally or not, they are entitled to the guarantees of the Fifth and Fourteenth Amendments' due process clauses, which protect against denial of life, liberty, or property without "due process of law."²⁴⁵ It is well settled that unemployment benefits are a statutorily created property interest which may not be abridged without the protection of due process.²⁴⁶ "Employer contributions to the unemployment trust fund can . . . be fairly characterized as payments made in lieu of wages. It is not a 'welfare' system, but an entitlement system."²⁴⁷

Are due process rights entitled to the same protection in the administrative as in the judicial context? The short answer is yes.

²⁴⁵ See *Board of Regents v. Roth*, 408 U.S. 564 (1972); Irene Scharf & Christine Hess, *What Process is Due? Unaccompanied Minors' Rights to Deportation Hearings*, 1988 DUKE L.J. 114, 116 & nn.8-10 (citing *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Galvan v. Press*, 347 U.S. 522 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Augustin v. Sava*, 735 F.2d 32 (2d Cir. 1984)). The Fifth Amendment attaches when the federal government denies life, liberty, or property, see *Fisher v. City of Cincinnati*, 753 F. Supp. 681 (S.D. Ohio 1990), and the Fourteenth attaches when the state government denies these rights. See *Patteson v. Johnson*, 721 F.2d 228 (8th Cir. 1983).

²⁴⁶ *Fleming v. Nestor*, 363 U.S. 603, 611 (1960); *Cosby v. Ward*, 843 F.2d 967, 982 (7th Cir. 1988); *Ross v. Horn*, 598 F.2d 1312, 1317-18 (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980).

The fact that these unemployment applicants have not yet been determined to be eligible for benefits makes their argument that they are protected by due process no weaker. "[E]ntitlement is precisely what is at issue, and the 'property' interest cannot be terminated or suspended without Fourteenth Amendment due process." *Steinberg v. Fusari*, 364 F. Supp. 922, 935 (D. Conn. 1973), *vacated*, 419 U.S. 379 (1975) (emphasis added).

²⁴⁷ *Brown v. Porcher*, 502 F. Supp. 946, 947 (D.S.C. 1980), *aff'd in part*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983).

"While many procedural due process cases involve the judicial process, the principles [of due process] are fully applicable to any . . . administrative forum entrusted with determinations of significant rights."²⁴⁸ Application of due process principles to the administrative arena stems from the belief that "[t]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking."²⁴⁹ And, since the case of *Fuentes v. Shevin*,²⁵⁰ courts have held that where the government's judicial machinery is used, any deprivation that cannot be characterized as de minimis is likely to require some form of notice and hearing.

Clearly, then, noncitizen unemployment applicants are entitled to due process. But, "what process is due"?²⁵¹ The determination is not a mechanical one, for "due process is flexible and calls for such procedural protections as the particular situation demands."²⁵²

In each case, "due process of law" requires an evaluation based on a disinterested inquiry pursued, . . . on a balanced order of facts, . . . on the detached consideration of conflicting claims, . . . [and] on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.²⁵³

Given that the "fundamental requirement of procedural due process is 'the opportunity to be heard,'"²⁵⁴ the particular due process required in individual situations is determined by balancing the following three factors: (1) the private interests affected by the official action; (2) the "risk of an erroneous deprivation of [the private interests] through the procedures used, and the probable value, if any, of [the suggested] safeguard;" and (3) the government interests affected by the suggested change, "including the . . . fiscal and administrative burdens that the [change] would entail."²⁵⁵ The weighing of governmental interests against those of the individual is appropriately done on a case-by-case basis.²⁵⁶

²⁴⁸ *Thompson v. Washington*, 497 F.2d 626, 634 (D.C. Cir. 1973) (citing *Londoner v. Denver*, 210 U.S. 373 (1908)).

²⁴⁹ *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (holding that summary replevin violates due process); see *United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973) (food stamps); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment compensation).

²⁵⁰ 407 U.S. 67 (1972).

²⁵¹ See Scharf & Hess, *supra* note 245, at 116 n.13.

²⁵² *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

²⁵³ *Rochin v. California*, 342 U.S. 165, 172 (1952) (citation omitted).

²⁵⁴ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

²⁵⁵ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁵⁶ *Steinberg v. Fusari*, 364 F. Supp. 922, 934 (D. Conn. 1973), *vacated*, 419 U.S. 379 (1975).

An examination of these three factors in light of the issue in question here demonstrates that the DOL has caused noncitizen unemployment claimants to suffer a deprivation of their procedural due process rights. First, the "significance of these [unemployment] benefits . . . 'cannot be overstated.'"²⁵⁷ Second, the risk of erroneous deprivation is great here because, had a notice and comment period been offered, the interests of noncitizen unemployment applicants would surely have been brought to the attention of the DOL, and the overwhelming and wide-ranging cases opposed to the DOL's "interpretation" would have become apparent, as would congressional satisfaction with the widely used meaning of PRUCOL. The value of following the required procedure would have been realized in the DOL's awareness that in issuing these Program Letters it was challenging well-established, well-reasoned precedent. This awareness might well have affected the DOL's decision as to whether to become involved in the PRUCOL issue in the first place.

Finally, the burden of the requested procedure—that the public have adequate notice of the proposed changes in order to comment on them—is slight. As the *Cosby* court pointed out, the state had no interest in depriving claimants of benefits to which they may have been entitled, and the burden of modifying the procedures to give claimants adequate notice of the rules before they came before a claims adjudicator was slight.²⁵⁸ A similar result should obtain here, where neither the states nor the federal government have any legitimate interest in depriving noncitizen claimants of benefits to which many of them *had been entitled* prior to the DOL's issuance of these Program Letters. Moreover, the burden of adhering to the APA requirements and allowing the democratic process to work as envisioned, with the public receiving notice of proposed regulations and thereafter having an opportunity to comment on them, is minimal; all that would be required is a little more time spent studying issues no one claims are exigent, and about which the Congress had recently indicated its satisfaction by remaining silent.²⁵⁹

There have been successful procedural due process challenges waged against administrative agency procedures. Courts have found public housing tenants constitutionally entitled to hearings prior to

²⁵⁷ *Cosby v. Ward*, 843 F.2d 967, 984 (7th Cir. 1988) (citing *Camacho v. Bowling*, 562 F. Supp. 1012, 1024 (N.D. Ill. 1983)).

²⁵⁸ *Cosby*, 843 F.2d at 984.

²⁵⁹ See *supra* notes 17-18 and accompanying text.

the housing authority imposing across-the-board rent increases,²⁶⁰ and to adjudicative hearings prior to an agency refusing to renew residential leases.²⁶¹ Courts have found unemployment claimants entitled to appropriate procedures when benefits are terminated,²⁶² and to adequate notice of work search requirements and the precise issues to be determined by unemployment claims adjudicators.²⁶³ In the case of *Steinberg v. Fusari*,²⁶⁴ for example, the court found due process lacking when a property interest to unemployment benefits was denied at an inadequate hearing that was not reviewable for a considerable length of time. In fact, the controversy under discussion in this Article is similar to that of *Steinberg*. Noncitizen unemployment applicants have been denied statutorily-required rulemaking procedures regarding these changes to PRUCOL, causing unnecessary benefit denials that are often not reviewed for a very long time.²⁶⁵

Courts have also found violations of procedural due process in situations akin to that at issue here where plaintiffs did not receive adequate notice prior to certain governmental actions. For example, the Ninth Circuit found procedural due process lacking when the state breached a privately owned dam and destroyed a lake without notifying the owners until hours before the breach, even though the state had made the plans to act much earlier.²⁶⁶ The court found that although there had been no emergency creating the need for action without notice, there was effectively no opportunity for the landowners to be heard, as the lack of notice made it virtually impossible to file a meaningful request for an injunction.²⁶⁷ "A few hours notice is as good as no notice at all when a meaningful court hearing requires plaintiffs to produce highly technical evidence."²⁶⁸ While of course

²⁶⁰ *Burr v. New Rochelle Mun. Hous. Auth.*, 479 F.2d 1165 (2d Cir. 1973); see *Thompson v. Washington*, 497 F.2d 626, 639 (D.C. Cir. 1973) (public housing tenants facing rent increase have substantial interest in participation).

²⁶¹ *Escalera v. New York City Hous. Auth.*, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970).

²⁶² *Steinberg v. Fusari*, 364 F. Supp. 922, 937 (D. Conn. 1973), vacated, 419 U.S. 379 (1975).

²⁶³ *Cosby v. Ward*, 843 F.2d 967, 986 (7th Cir. 1988).

²⁶⁴ *Steinberg*, 364 F. Supp. at 937-38. Eighty-nine point nine percent of all appeals took over 100 days to decide. *Id.* at 934.

²⁶⁵ See Decision of Board of Review, Appeal No. BR-50412-OP (Mass. Dep't Employment & Training Dec. 10, 1992) (overturning incorrect PRUCOL determination made in December 1992, while initial denial made in August 1991).

²⁶⁶ *Sinaloa Lake Owners Ass'n v. Simi Valley*, 882 F.2d 1398, 1410 (9th Cir. 1989), cert. denied, 495 U.S. 1016 (1990).

²⁶⁷ *Id.* at 1406 n.7.

²⁶⁸ *Id.*

the PRUCOL question differs from a dam breach, the property rights at stake for the unemployment applicant can fairly be said to be entitled to even greater protection than was the property right of the landowners in *Sinaloa*. Nonetheless, the protections provided to the unemployment claimants should at least be *as stringent* as those provided the landowners. And, as both cases involve insufficient notice of anticipated governmental action and neither an emergency nor other valid excuse warranting failure to follow required procedure, the court's ruling in *Sinaloa* that procedural due process was violated by inadequate notice should obtain here as well.

It is true that property rights created by statutory entitlement can be abridged or otherwise substantively changed.²⁶⁹ The "legislature generally has the power to impose new regulatory constraints on the way in which those rights are used . . . [a]s long as the constraint . . . is a reasonable restriction designed to further legitimate legislative objectives"²⁷⁰ and the legislature "provides constitutionally adequate process . . . by enacting the statute [and] publishing it."²⁷¹ This is true even regarding vested property rights to which the public has come to expect, including government benefits such as social security, unemployment, and the various public benefit programs.²⁷² Nonetheless, the DOL's change in the meaning of PRUCOL remains a violation of procedural due process for a number of reasons. First, the abridgement of unemployment rights accomplished here is not one accomplished legislatively, as was envisioned by the Supreme Court in *United States v. Locke*.²⁷³ Further, this substantive change, which originated not from the legislature but from an agency, has been effectuated by informal mailings to state agencies²⁷⁴ and not direct mailings or other contact with the thousands of affected nonci-

²⁶⁹ *United States v. Locke*, 471 U.S. 84, 108 (1985) (rejecting challenge to act providing for automatic forfeiture of mining land claims unless certain filings were made by purported owners).

²⁷⁰ *Id.* at 104.

²⁷¹ *Id.* at 108.

²⁷² See *Richardson v. Belcher*, 404 U.S. 78, 80 (1971) (holding that offset of social security benefits by workers compensation does not violate due process; "a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment" (quoting *Fleming v. Nestor*, 363 U.S. 603, 611 (1960))); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982) (holding that a welfare recipient is not deprived of due process when the legislature adjusts benefit levels). "[T]he legislative determination provides all the process that is due." *Logan*, 455 U.S. at 433.

²⁷³ 471 U.S. 84, 108 (1985).

²⁷⁴ Telephone Interview with member of the Legal Department of the Massachusetts Department of Employment and Training (Oct. 23, 1992).

tizen unemployment applicants. The untimely and haphazard publication in the Federal Register²⁷⁵ in no way saves a process that is wholly constitutionally inadequate. The process that should have been followed is dictated by the APA.²⁷⁶ Yet as previously discussed, although no exceptions to that Act apply, it has not been followed.²⁷⁷ This abject failure of appropriate process violates procedural due process. And the breach is even more egregious, given that proper process would no doubt have informed the DOL that its contemplated rule thwarted congressional intent as well as the overwhelming weight of case law. Thus, had the democratic process been permitted to operate in the manner intended by Congress when it enacted and amended the APA, had the DOL benefited by that process during the statutorily-required notice and comment period, the DOL might very well have given more serious consideration before instituting this change,²⁷⁸ and very likely would not have instituted it at all.

VI. SUBSTANTIVE DUE PROCESS WAS VIOLATED AND THE DOL EXCEEDED ITS AUTHORITY BY PROMULGATING RULES THAT CONTRAVENED CONGRESSIONAL INTENT

Not only do the procedures followed by the DOL in promulgating these Program Letters violate procedural due process, but they also have subjected the unemployment applicants themselves to violations of substantive due process. The legal authority of the DOL in this instance only extends as far as administering the provisions of FUTA.²⁷⁹ While FUTA does not define PRUCOL, there is clear instruction as to its meaning from the legislative history²⁸⁰ as well as

²⁷⁵ See *supra* text accompanying notes 242-44.

²⁷⁶ 5 U.S.C. § 553 (1988).

²⁷⁷ See *supra* part IV.

²⁷⁸ It is beyond the scope of this Article to discuss the particular causes of action these unemployment claimants may have in challenging the actions described herein, given the recent Supreme Court decision in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992) (precluding the enforcement of provisions of a certain state plan for adoption assistance by claimants under 42 U.S.C. § 1983 (1988)). It is worth noting, however, that *Artist M.* does not apply to the enforcement of state laws for unemployment insurance. This distinction was recently recognized by Congress when it drafted remedial legislation to undo the effects of *Artist M.* See Revenue Act of 1992, H.R. 11, 102d Cong., 2d Sess., 138 CONG. REC. H12,227 (daily ed. Oct. 5, 1992) (vetoed by President Bush). The distinction played a significant role in the decision to leave the unemployment insurance program out of the bill, because the additional language was considered by the state legislators to be unnecessary. See, e.g., 138 CONG. REC. H12,560 (daily ed. Oct. 5, 1992) (conference agreement) ("The conferees do not believe that *Suter v. Artist M.* would be applied to the unemployment compensation program.").

²⁷⁹ See 26 U.S.C. § 3304 (1988).

²⁸⁰ See *supra* part II.

from the case law developed over the past fifteen years.²⁸¹ Hence, the appropriate definition of PRUCOL for the DOL's purposes must be consistent with both congressional intent and with the overwhelming number of courts that have decided the issue over the past fifteen years. The fact that the meaning is inconsistent yields the inevitable conclusion that the Program Letters themselves, as well as any state actions (both administrative and judicial) that conform to the Program Letters' directives have denied noncitizen unemployment applicants substantive due process.

The purpose of due process is "fundamental fairness in judicial [and] administrative proceedings which may adversely affect the protected rights of an individual."²⁸² The due process clauses place substantive and procedural limitations on the exercise of governmental power, guarding against arbitrary and capricious action and restricting the scope and character of governmental activities,²⁸³ even when the procedures engaged in prior to taking the action are constitutionally adequate.²⁸⁴ In regard to substantive due process, "the Supreme Court has interpreted the due process clause . . . to confer certain substantive rights based mainly in the Bill of Rights."²⁸⁵ The clause prevents government officials from engaging in conduct with regard to those rights that "shocks the conscience,"²⁸⁶ interferes with "the concept of ordered liberty,"²⁸⁷ or is gravely unfair in the discharge of the officials' legal responsibilities.²⁸⁸ And it protects against the abolition of a right, where that abolition "violate[s] a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"²⁸⁹

The due process clause protects property as well as life and liberty. Throughout history, rights were not divided between personal and property. On the contrary, the Magna Carta established the princi-

²⁸¹ See *supra* part III.

²⁸² *Baugh v. Woodard*, 604 F. Supp. 1529, 1536 (E.D.N.C. 1985), *aff'd in part*, 808 F.2d 333 (4th Cir. 1987).

²⁸³ *Haag v. Cuyahoga County*, 619 F. Supp. 262, 275 (N.D. Ohio 1985), *aff'd*, 798 F.2d 1414 (6th Cir. 1986).

²⁸⁴ *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990); *Madden v. City of Meriden*, 602 F. Supp. 1160, 1166 (D. Conn. 1985); see *Pittsley v. Warish*, 927 F.2d 3, 6 (1st Cir.), *cert. denied*, 112 S.Ct. 226 (1991).

²⁸⁵ *Brown v. Brien*, 722 F.2d 360, 366 (7th Cir. 1983).

²⁸⁶ *Rochin v. California*, 342 U.S. 165, 172 (1952).

²⁸⁷ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

²⁸⁸ *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir.), *cert. denied*, 488 U.S. 956 (1988).

²⁸⁹ *Palko*, 302 U.S. at 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

ple, basic to the common law and later to our Constitution, that liberty and property were of identical import. Ownership of property was evidence of liberty.

[I]t was . . . decreed that neither the King nor government could take property except *per legem terrae*. The reach was not procedural but substantive. Coke in his writings used the phrase interchangeably with 'due process of law;' and, in this form, the concept was included in the [F]ifth [A]mendment of the United States Constitution.²⁹⁰

So, for example, it is a violation of substantive due process for a government to break a contract with an employee in order to induce the employee to give up First Amendment rights.²⁹¹

Where a violation of an identified property interest protected by substantive due process is proved, the standard of proof is lower than it is when no such property violation is involved. In the example of the First Amendment violation, then, proof of conduct shocking the conscience is necessary in order to show a violation of substantive due process.²⁹² However, where a specified property interest is alleged to have been violated, courts balance factors such as "the need for the governmental action in question, the relationship between the need and the action, the extent of harm inflicted, and whether the action was taken in good faith or for the purpose of causing harm."²⁹³ Indeed, governmental entities *do* have much latitude in carrying out their responsibilities, so that mere errors of judgment, or misguided or mistaken actions do not violate due process. A simple legal error of local law (with respect to, for example, the durational occupancy requirement for adverse possession) is "the inheritance of fallible human institutions, not a failing of constitutional dimensions."²⁹⁴ But "malicious, irrational, and plainly arbitrary actions"²⁹⁵ are not legitimate exercises of power.

To establish a violation of substantive due process, plaintiffs must prove that the governmental action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety,

²⁹⁰ *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1409 n.11 (9th Cir. 1989) (quoting Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 Sw. U. L. Rev. 627, 637-38 (1988) (citations omitted)), *cert. denied*, 495 U.S. 1016 (1990).

²⁹¹ *Brown v. Brienen*, 722 F.2d 360, 367 (7th Cir. 1983).

²⁹² *Pittale v. Warish*, 927 F.2d 3, 6-7 (1st Cir.) (citing *Rochin v. California*, 342 U.S. 165 (1952)), *cert. denied*, 112 S. Ct. 226 (1991).

²⁹³ *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1409.

²⁹⁴ *Corporation of the Presiding Bishop v. Hodel*, 830 F.2d 374, 387 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988).

²⁹⁵ *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1409.

morals, or general welfare.'"²⁹⁶ "[T]he substantive due process doctrine proscribes 'deprivation of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious.'"²⁹⁷ Arbitrary and capricious has been said to be invidious or irrational;²⁹⁸ violations of property interests have been found to be so invidious. For example, in *Sinaloa Lake Owners Ass'n v. City of Simi Valley*,²⁹⁹ the Court of Appeals for the Ninth Circuit found a violation of substantive due process when the government invoked emergency powers although it knew, or should have known, that no exigency justified the measures taken (breaching a privately-owned dam and destroying a lake without notice to the owners or an opportunity to be heard). The court found that the government officials destroyed the dam for no legitimate reason, intentionally concealing their decision as long as possible, in order to prevent the plaintiffs from taking advantage of the legal process.³⁰⁰ Even the denial of a seemingly insignificant property right, a right to obtain a building permit, can violate substantive due process.³⁰¹ Indeed, in *Littlefield v. City of Afton*,³⁰² the Eighth Circuit held that the plaintiffs stated a substantive due process claim when they alleged that the city acted arbitrarily and capriciously by imposing conditions on the granting of a permit that were not contained in the city's ordinance. The court issued its decision with apparently little concern for the city's motivation in imposing the illegal conditions.

Sinaloa and, more broadly, the cases involving substantive due process violations in the land use area can inform the issues here. The DOL has acted in a manner not unlike that of the government officials in *Sinaloa*. Here, the DOL forced a change in the law of PRUCOL without either prior notice to those affected or an opportunity for them to be heard on the wisdom of the changes, as is intended by the APA. Just as no exigency justified the state's actions in *Sinaloa*, no emergency or other legitimate reason justified the DOL to enact these rules without a prior notice and comment period. To

²⁹⁶ *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6 (1977) (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

²⁹⁷ *Anthony v. Franklin County*, 799 F.2d 681, 684 (11th Cir. 1986) (quoting *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982)).

²⁹⁸ *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988).

²⁹⁹ 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 495 U.S. 1016 (1990).

³⁰⁰ *Id.* at 1410.

³⁰¹ *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986); *accord* *Cunningham v. City of Overland*, 804 F.2d 1066 (8th Cir. 1986) (substantive due process violated in denial of merchant's license).

³⁰² 785 F.2d 596 (8th Cir. 1986).

make matters worse, the DOL's good faith in taking these actions is in question, as there can be little doubt that the actions were taken with full knowledge of the long-standing controversy surrounding PRUCOL. In fact, given the history of PRUCOL, it is likely that the DOL took its actions out of fear of the anticipated public outcry over the changes, had the public been informed. And finally, the actions were taken in spite of the fact that Congress approved the expansive judicial interpretations of PRUCOL by neither adding restrictions nor altering its definition statutorily, even when the suggestion to do so was made as recently as 1985.³⁰³

The result of the DOL's actions has been to cause vast harm to its victims. Noncitizen unemployment claimants in various states have been denied benefits—a lifeline for them—under a new rule when they would otherwise have been granted benefits under their state's common law rule.³⁰⁴ In addition to that egregious harm, the democratic process has been compromised by a federal agency dictating substantive law to the states, ignoring the inviolability of state common law.³⁰⁵ Accordingly, the actions of the DOL have no substantial relation to the general welfare, and the DOL's determination to thwart the democratic process should not go unnoticed.

VII. CONCLUSION

The present confusion in the definition of "permanently residing under color of law," as it relates to the eligibility of noncitizens for unemployment benefits, serves little purpose. It certainly does not benefit the intended beneficiaries of the unemployment insurance laws, the temporarily unemployed workers who urgently need funds to carry over until subsequent employment becomes available. The confusion in the definition was created in the mid-1980s, when the DOL began issuing its Program Letters. Prior to that, since the 1970s, common law development of the phrase was proceeding as it should—jurisdictions faced with the question would look to analogous cases in other jurisdictions, with the overwhelming majority choosing to follow the interpretation of *Holley v. Lavine* and its prog-

³⁰³ See *supra* notes 16-17 and accompanying text.

³⁰⁴ See, e.g., Decision of Board of Review, Appeal No. BR-50412-OP (Mass. Dep't Employment & Training Dec. 10, 1992).

³⁰⁵ See, e.g., *Yellow Transit Freight Lines, Inc. v. United States*, 221 F. Supp. 465 (N.D. Tex. 1963) (Interstate Commerce Commission had no power to determine the meaning of state legislative action when the locality had undertaken to define the meaning and extent of the powers of its own ordinance).

eny. Since the issuance of the DOL's missives, while some states have continued to follow their own courts' most often broad interpretation of the phrase, others have shunned the local definition in favor of that of the DOL, at least partially out of fear of decertification. A third group of jurisdictions has found ways to avoid applying the demands of the Program Letters, but has not been forthcoming as to the true reason behind this avoidance.

The DOL should immediately suspend the Program Letters under discussion in this Article, and permit the states to again regulate those aspects of unemployment insurance that have traditionally been subject to local rule. Short of suspending the Program Letters, the DOL should at least promulgate them as rules in accordance with the APA. In that event, interested parties representing both individual states and noncitizen unemployment applicants would have the opportunity to respond formally to these meaningful changes in the definition of PRUCOL. Restoring a process of openness in this arena, a process envisioned by the APA, will help return a sense of fairness, hence legitimacy, to an administrative branch that today needs a renaissance of the democratic spirit.